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No. 07-

IN THE

Supreme Court of the United States

GERI KANNAPIEN and JANICE ROZHON,

Petitioners,

v.

QUAKER OATS COMPANY and PEPSICO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition squarely presents an issue over which the circuits are divided: When an employee solicited to voluntarily terminate her employment or take early retirement based on an employer's written or oral misstatement of available benefits, what law applies to determine whether those promised benefits will be enforced.

The circuits are divided on two issues:

First, whether ERISA applies to all aspects of severance packages which contain ERISA-plan benefits or just the benefits governed by ERISA plans.

Second, what is the ERISA standard for equitable estoppel claims? The Second, Third, Fifth, Ninth and Eleventh Circuit Courts of Appeals permit a plaintiff to succeed under equitable estoppel principles under ERISA without showing an employer intent to deceive. In contrast, the Seventh Circuit requires misled employees to show an employer's "intent to deceive" in order to prevail under an equitable estoppel theory.

In that context, the question is whether two employees who were solicited by and induced to retire by their employer's admitted misstatement of benefits under a one-time early severance package may enforce the promised benefits, under equitable estoppel principles without having to prove an employer intent to deceive?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. Litigation	3
REASONS FOR GRANTING THE PETITION	4
I. The Circuits' Conflicting Tests For Equitable Estoppel In the ERISA Context, Creating A Violent Circuit Split	5

Contents

Page

1. The Seventh Circuit's "intent to deceive" requirement conflicts with most other Circuits' equity-based standards for equitable estoppels, and wrongly adopts the requirements for the legal common law fraud remedy, rather than the equitable estoppel remedy. 5

   A. The Second Circuit's "Four equitable elements" plus "extraordinary circumstances" test. 6

   B. The Third, Fifth, and Ninth Circuit's "two-part test" plus "extraordinary circumstances" requirement. 7

   C. The Sixth Circuit requires intent, but only to induce action by the employee, not intent to mislead. 9

   D. The Eleventh Circuit's rule does not require intent to deceive. ... 11

   E. The Fourth Circuit Rule: No estoppel permitted where it would effect an amendment to the Plan. 12

Contents

Page

F. The First Circuit's Rule has not been definitively declared, but likely would be: No estoppel to amend the plan unless plan is ambiguous, "*Material Misrepresentation*" Standard, but misstatement must be as to a factual term. 13

II. It is Important That a Unified, Fair Standard Exist so that Employees and Employers alike may Know What their Rights are. 15

III. This is An Important Question of Federal Law Because The Case Falls Squarely within the "Regulatory Vacuum" Previously Acknowledged By This Court. 16

IV. This is a Superior Vehicle for this Court's Consideration. 18

CONCLUSION 19

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided November 14, 2007 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Filed May 15, 2006 ..... 23a

Appendix C — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated December 21, 2007 ..... 50a

TABLE OF CITED AUTHORITIES

Page

Cases:

Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001) 7

Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488 (2004) 16

Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140 (2d Cir.1999) 6

Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 10

Bell v Pfizer, Inc., 499 F. Supp. 2d 404 (S.D.N.Y. 2007) 7

Cicio v. Does, 321 F.3d 83 (2d Cir. 2003) 17

Cotton v. Massachusetts Mut. Life Ins. Co., 402 F.3d 1267 (11th Cir. 2005) 11

Crosby v. Rohm & Haas Co., 480 F.3d 423 (6th Cir. 2007) 10

Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994) 8

Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir. 2001) 7

Cited Authorities

Page

Devlin v. Transp. Commc'ns Int'l Union,
173 F.3d 94 (2d Cir. 1999) 7

DiFelice v. Aetna U.S. Healthcare,
346 F.3d 442 (3d Cir. 2003) 17, 18

Earl v. Life Ins. Co. Of North America,
204 Fed. Appx. 592 (9th Cir. 2006) 9

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204, 122 S. Ct. 708 (2002) 17

Harrison v. Aetna Life Ins. Co.,
925 F. Supp. 744 (M.D. Fl. 1996) 14

HealthSouth Rehabilitation Hospital v. American National Red Cross,
101 F.3d 1005 (4th Cir. 1996) 12

High v. E-Systems Inc.,
450 F.3d 573 (5th Cir. 2006) 8

Jones v. American General Life and Acc. Ins. Co.,
370 F.3d 1065 (11th Cir. 2004) 11

Kaliebe v. Parmalat USA Corp.,
2005 WL 711995 (N.D. Ill. 2005) 19

Kane v. Aetna Life Ins.,
893 F.2d 1283 (11th Cir. 1990) 12

Cited Authorities

Page

Law v. Ernst & Young,
956 F.2d 364 (1st Cir. 1992) 14

Livick v. Gillette Co.,
__ F.3d __, 2008 WL 174225 (1st Cir. 2008) ... 13

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134, 105 S. Ct. 3085 (1985) 16

Mauser v. Raytheon Co. Pension Plan for Salaried Employees,
239 F.3d 51 (1st Cir. 2001) 14, 15

Mertens v. Hewitt Associates,
508 U.S. 248, 113 S. Ct. 2063 (1993) 16

Pell v. E.I. DuPont De N. & Co. Inc.,
2006 WL 2864604 (D. Del. 2006) 8

Pisciotta v. Teledyne Indus., Inc.,
91 F.3d 1326 (9th Cir. 1996) 9

Robinson v. New Orleans Employers ILA AFL-CIO Pension Welfare,
2008 WL 687289 (5th Cir. 2008) 8

Schonholz v. Long Island Jewish Med. Ctr.,
87 F.3d 72 (2d Cir. 1996) 7

Smith v. Hartford Ins. Group,
6 F.3d 131 (3d Cir. 1993) 8

Cited Authorities

Page

Spink v. Lockheed Corp.,
125 F.3d 1257 (9th Cir. 1997) 9

Thomas v. Miller,
489 F.3d 293 (6th Cir. 2007) 10

Trs. of Mich. Laborers' Health Care Fund v. Gibbons, 209 F.3d 587 (6th Cir. 2000) 10, 11

Trustees of AFTRA Health Fund v. Biondi,
303 F.3d 765 (7th Cir. 2002) 5

Vytra Healthcare v. Cicio,
542 U.S. 933, 124 S. Ct. 2902 (2003) 17

Watkins v. Westinghouse Hanford Co.,
12 F.3d 1517 (9th Cir. 1993) 14

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 (1988) 1

29 U.S.C. § 1132(a)(3) 1

29 U.S.C. § 1132(e) 1

Other Authorities:

Russell, Mertens, and Great-West,
103 Colum. L. Rev. 1317 (2003) 18

OPINIONS BELOW

The opinion and order of the district court (per Bucklo, D.J.) (Appendix ("Pet. App."), Pet. App. A) granting summary judgment against petitioners is reported at 433 F.Supp.2d 895. The opinion of the court of appeals (per Kanne, joined by Easterbrook and Evans) affirmed the district court's decision (Pet. App. B) and is reported at 507 F.3d 629. The court of appeals' order denying rehearing en banc (Pet. App. C) is not reported.

JURISDICTION

The jurisdiction of the district court was invoked under 29 U.S.C. § 1132(e) & (f) of the Employee Retirement Income Security Act of 1974 (ERISA) and under 28 U.S.C. § 1331 (1988). The judgment of the court of appeals was entered on November 14, 2007. A timely petition for rehearing en banc was denied on December 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Upon petitioners' motion, Mr. Justice Stevens on March 19, 2008, extended the time to petition for certiorari to May 5, 2008.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 1132(a)(3)

(a) Persons empowered to bring a civil action

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms

> of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

STATEMENT OF THE CASE

1. Nature of the Case

The petition presents "ERISA's most persistent problem"[1]—the standard to be applied when employees detrimentally rely on employer promises that are inconsistent with plan terms.

Specifically, this action arises from an employer's attempt to downsize by soliciting employees with a special "one-time" early termination package that was described both in writing, and orally by the company's designated human resources manager, as dating in all respects from the employees' original hire date.

One year after accepting the package and separating, the plaintiffs noticed that their checks were much lower than anticipated. Learning that their benefits were being differently calculated, from the 10 or 13-years-later date of their original employer's acquisition by Quaker, both brought the "error" to the attention of the HR manager (Jeff Satterlee), who had explained the terms in the original solicitation. Agreeing with them, he pursued the matter for them up through internal corporate channels, but without success. At his

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[1] Brauch, Jeffrey, *ERISA at 25-And Its Most Persistent Problem*, 48 U.Kans. L.Rev. 285 (Jan.2000)

recommendation, they petitioned the employer/plan administrator, who chose to ignore the promised package and held to the specific terms of the existing pension plan, which credited service only from the date of Quaker's interim acquisition of the original employer, depriving petitioners respectively, of 10 and 13 years of retirement credit, approximately $100,000 each.

2. Litigation

On October 22, 2004, Petitioners sued the soliciting employer, asserting their entitlement to the promised benefits, under principles of equitable estoppel, both ERISA and state law, asserting that the employer, rather than the plan should be liable, and that although ERISA was a basis for some parts of the package, the special "one-time" early termination package was governed by usual State contract law provisions governing severance agreements for non-ERISA aspects of the package.

On May 15, 2006, the District Court, (Hon. Elaine Bucklo, USDJ) granted summary judgment, holding the matter entirely pre-empted by ERISA, that equitable estoppel was unavailable for lack of a showing, under Seventh Circuit standards, the employer's intent to deceive, a lack of detriment (since the employees had received no less than if they'd been involuntarily terminated), and that the employer's resort to the strict Plan terms was not precluded by its own ignoring of the written terms of the non-ERISA Change in Control benefits, in providing the package it chose to provide. *Kannapien v. Quaker Oats Co. and Pepsico,* 433 F.Supp.2d 895 (N.D. Ill. 2006) (Pet. App. A). The Seventh Circuit affirmed (Pet. App. B) and denied rehearing. (Pet. App. C).

REASONS FOR GRANTING THE PETITION

The issue of the appropriate standard required for applying equitable estoppel under ERISA — what is required to enforce an employer promise that conflicts with strict plan terms — is considered ERISA's most persistent unresolved problem; one on which almost every federal circuit has weighed in on, but governed by quite different standards: 1) traditional equitable standards; 2) equitable standards plus "extraordinary circumstances"; 3) the Seventh Circuit's requirement, akin to common law fraud, requiring a showing of employer intent to deceive; or 4) no equitable estoppel at all.

Coupled with this is the pre-emption issue: whether ERISA applies to all, or just the ERISA portions of a termination package that includes non-ERISA severance provisions, and the extent to which State contract law still applies to employer severance packages which involve non-ERISA provisions.

Further, the case is a superior vehicle for review because it presents undisputed facts as to the employer's solicitation and admitted promised package by the designated employer official, with a clear result under each of the four standards.

I. The Circuits' Conflicting Tests For Equitable Estoppel In the ERISA Context, Creating A Violent Circuit Split

The thirteen federal circuits have developed quite different tests to determine when a plaintiff can state an equitable estoppel claim; plus one circuit rejects it entirely. As a result, instead of uniformity nationwide, employees of the same company, participants in the same ERISA plans or severance packages, could well experience widely different litigation results from the same employer actions, and the employer's obligations to employees would depend entirely on where the company is sued[2].

1. The Seventh Circuit's "intent to deceive" requirement conflicts with most other Circuits' equity-based standards for equitable estoppels, and wrongly adopts the requirements for the legal common law fraud remedy, rather than the equitable estoppel remedy.

The standard used by the Seventh Circuit conflicts with its sister circuits in a number of ways, but mainly in its requirement of a "knowing misrepresentation" or "intent to deceive." This standard also contrasts with common-law equitable estoppel principles that govern the other circuits' standards.

Under any circuit outside the Seventh Circuit, Mmes. Kannapien and Rozhon's claims would satisfy the requirements for ERISA equitable estoppel. However, in the Seventh Circuit, they were denied relief based solely on their inability to prove that the employer's admittedly misstated solicitation to early severance was intended to mislead.

A. The Second Circuit's "Four equitable elements" plus "extraordinary circumstances" test

The Second Circuit test requires only the four traditional equity elements (promise, reliance, injury, injustice) plus "extraordinary circumstances", that would be satisfied by these Plaintiffs. Specifically, the Second Circuit requires five elements in a claim of promissory estoppel in an ERISA case: (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, (4) injustice if the promise is not enforced, and (5) "extraordinary circumstances." *See, Aramony v. United Way Replacement Benefit Plan,* 191 F.3d 140, 151 (2d Cir. 1999). The fifth requirement was imposed "to lessen the danger that commonplace communications from employer to employee will routinely be claimed to give rise to employees' rights beyond those contained in formal benefit plans." *Id.*

Notably, the Second Circuit has found extraordinary circumstances in cases where an employer reneged on a promise made with the intention of inducing employees to take actions benefiting the employer, such as joining

the company or accepting early retirement. *See Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 101 (2d Cir. 2001); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 86-87 (2d Cir. 2001); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 80 (2d Cir. 1996); *see also Devlin v. Transp. Commc'ns Int'l Union*, 173 F.3d 94, 102 (2d Cir. 1999) ("[T]he remarkable consideration in *Schonholz* was the defendants' use of promised severance benefits as an inducement to persuade Schonholz to retire."). *But see Devlin v. Empire*, 274 F.3d at 86 (reserving question of whether extraordinary circumstances other than intentional inducement would suffice). By contrast, a promise does not, by itself, rise to the level of extraordinary circumstances simply because an employee relies on it. *Devlin v. Transp. Commc'ns*, 173 F.3d at 102. *See also*, (*Bell v Pfizer, Inc.*, 499 F.Supp.2d 404, 409 (S.D.N.Y. June 1, 2007) (Kimba Wood, USDJ)).

Mmes. Kannapien and Rozhon would easily satisfy the first four elements as well as the "extraordinary circumstances" element that governs Second Circuit claims.

B. The Third, Fifth, and Ninth Circuit's "two-part test" plus "extraordinary circumstances" requirement.

The Third, Fifth and Ninth Circuits also employ a standard that Mmes. Kannapien and Rozhon satisfy. Specifically, in the Third Circuit, to succeed under an equitable estoppel theory, an ERISA plaintiff must establish (1) a material representation, (2) reasonable

and detrimental reliance upon the representation, and (3) extraordinary circumstances. *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994); *Smith v. Hartford Ins. Group*, 6 F.3d 131, 137 (3d Cir. 1993) (citing *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir.1991)).[2]

Identically, the Fifth Circuit requires only: (1) a material misrepresentation (no intent to deceive required); (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances, *High v. E-Systems Inc.*, 450 F.3d 573 (5th Cir. Aug 3, 2006)[3].

In an ERISA action in the Ninth Circuit, a plaintiff must allege a material misrepresentation, reasonable and detrimental reliance upon the representation, extraordinary circumstances, that the provisions of the

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[2] Third Circuit courts have also applied equitable estoppel, requiring only: 1) the employer's misstatement; 2) extended to induce reliance, reasonable reliance and action to one's detriment, as supporting estoppel against an employer requiring it to make future payments in accordance with the representation. *Pell v. E.I. Dupont De N. & Co., Inc.*, slip op 2006 WL 2864604 (D.Del.Oct.6, 2006) requires "ambiguity of plan terms" but no intent to deceive.

[3] *See also, Robinson v. New Orleans Employers ILA AFL-CIO Pension Welfare*, slip op., 2008 WL 687289 (5th Cir. March 13, 2008), rejecting widow's claim to benefits based on estoppel claim that oral representation could modify "clear definition of 'qualified spouse'[requiring 12months marriage preceding Approved Retirement Date] in the plan's terms." Slip op. at *3.

plan at issue were ambiguous such that reasonable persons could disagree as to their meaning or effect, and finally, that representations were made involving an oral interpretation of the plan. *Spink v. Lockheed Corp.*, 125 F.3d 1257 (9th Cir. 1997) (upholding plaintiff's claim) (citing, *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996). The Ninth Circuit requires that the plan terms be ambiguous and that the reliance be reasonable. *Earl v. Life Ins. Co. Of North America*, 204 Fed. Appx. 592 (9th Cir. Oct. 27, 2006).

Under the Third, Fifth and Ninth Circuit standards, Mmes. Kannapien and Rozhon would clearly have prevailed.

C. The Sixth Circuit requires intent, but only to induce action by the employee, not intent to mislead.

The Sixth Circuit rule follows general equitable estoppel principles, with an intent to induce action -- such as the solicitation present here -- , but without requiring either an intent to deceive or ambiguous plan terms:

> "In order for a party to employ equitable estoppel against another party, the following elements must be satisfied. First, the party to be estopped must have used 'conduct or language amounting to a representation of material fact.' Second, that party must have been aware of the true facts. Third, that party must have had an intention that the

> representation be acted on, or have conducted himself in such a way toward the party asserting estoppel that the latter had a right to believe that the former's conduct was so intended. Fourth, the party asserting estoppel must have been unaware of the true facts. Finally, the party asserting estoppel must have detrimentally and justifiably relied on the representation. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, at 1298. [6th Cir. 1991)] ("All of these elements must be present before the court may order estoppel.")

Trustees of Mich. Laborers' Health Care Fund v. Gibbons, 209 F.3d at 91 and *Thomas v. Miller*, 489 F.3d 293 (6th Cir. June 27, 2007), and as further described in *Crosby v Rohm & Haas Co.*, 480 F.3d 423 (6th Cir. March 16, 2007):

> To bring a cognizable equitable-estoppel claim, Crosby bears the burden of showing that Rohm and Haas made fraudulent representations to Allred, that Allred did "not know the truth behind [Rohm and Haas's] representations," *Trs. of the Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir.2000), and that Allred detrimentally and justifiably relied on Rohm and Haas's representations, *see Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991). *Cf. Sprague*, 133 F.3d at 403 ("Altering a welfare plan on the basis of non-plan documents and communications, absent a

particularized showing of conduct tantamount to fraud, would undermine ERISA.") (internal quotation marks omitted).

And note that the Sixth Circuit's "fraud" element is satisfied by *either* intended deception or "gross negligence as to amount to constructive fraud", *id.*, "contain[ed] an element of fraud, either intended deception or such gross negligence as to amount to constructive fraud." *Mich. Laborers' Health Care Fund*, 209 F.3d at 591 (internal quotation marks and ellipsis omitted). Mmes. Kannapien and Rozhan' claims also clearly met that standard.

D. The Eleventh Circuit's rule does not require intent to deceive.

The Eleventh Circuit requires only an oral statement and representation which constitutes an oral interpretation of the plan, without requiring intent to deceive. Specifically, the Eleventh Circuit has stated: "[t]his circuit has created a very narrow common law doctrine under ERISA for equitable estoppel. It is only available when (1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity." *Cotton v. Massachusetts Mut. Life Ins. Co.*, 402 F.3d 1267 (11th Cir. 2005) (citations omitted), *see also*, *Jones v. American General Life and Acc. Ins. Co.*, 370 F.3d 1065 (11th Cir. 2004) (stating that plaintiff can show that (1) the relevant provisions of the plan at issue are ambiguous, and (2) the plan provider or administrator

has made representations to the plaintiff that constitute an informal interpretation of the ambiguity). *See also, Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285-86 (11th Cir. 1990). (The standard only applies narrowly where the plan's terms are ambiguous and representations are made which constitute an oral interpretation of the plan.)

In the context of this case, it might well be that the severance plan terms were ambiguous enough for this standard to apply (since Quaker's designated HR representative believed that his misstatement was the severance plan terms.)

E. The Fourth Circuit Rule: No estoppel permitted where it would effect an amendment to the Plan.

The Fourth Circuit rejects the concept of equitable estoppels where it would effect an amendment to a written ERISA plan. *HealthSouth Rehabilitation Hospital v American National Red Cross*, 101 F.3d 1005, 1010-1012 (4th Cir. 1996) (upholding the administrator's denial of payment to a third party provider hospital that had been initially confirmed coverage, but subsequently was advised that the particular patient's parent had never elected coverage for him). However, it is uncertain whether the Fourth Circuit would necessarily apply than holding to facts where an employer had, as here, solicited employees to act with a promised severance package with Non-ERISA benefits. Petitioners here believe that the an *employer-initiated* solicitation by a

"special" or otherwise non-plan early termination package ought to be viewed by traditional contract provisions as a claim against the employer, rather than a claim on the plan.

F. The First Circuit's Rule has not been definitively declared, but likely would be: No estoppel to amend the plan unless plan is ambiguous, *"Material Misrepresentation"* Standard, but misstatement must be as to a factual term.

The First Circuit has not yet definitively chosen a position. Recently rejecting a claim by an involuntarily terminated employee to enforce an estimated benefits level that would conflict with unambiguous plan terms, the First Circuit acknowledged that although "[m]ost of our sister circuits have recognized estoppel claims under ERISA's enforcement provisions. . . . We have previously found it unnecessary to decide whether we will follow suit" and, as of April 17, 2008 had not found a case with "suitable facts to present the issue to us." *Livick v. Gillette Co.*, __ F.3d __, 2008 WL 174225 (1st Cir. April 17, 2008). In that case, the court rejected an estoppel claim by an employee who was terminated (so could not claim reliance in taking a *voluntary* retirement package) and claimed to have been misled as to the estimated benefits he was to receive. *Id.* The First Circuit there held that the mere ministerial miscalculation of benefits under a clear plan is not a breach of fiduciary duty and insufficient to obtain

estoppels, either. *Id.* However, other 1st Circuit panels have commented on the direct split among circuits:

> While some Circuits, like the Ninth, have concluded that such claims are not permitted under ERISA, *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), other courts have found that the federal common law of equitable estoppel may apply where a plan administrator orally informs a beneficiary of its interpretation of an ambiguous term under the plan. *Harrison v. Aetna Life Ins. Co.*, 925 F.Supp. 744, 747-48 (M.D. Fl. 1996). Our circuit has reserved the question of whether such a right exists, *See, Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 58 (1st Cir. 2001) (citations omitted) (noting what the elements of estoppel would be in a case involving misrepresentations in a summary plan description, but "leave[ing] for an appropriate case whether there may exist an equitable estoppel claim in cases where misrepresentations exist apart from the Plan Summary."); *Law*, 956 F.2d at 370 fn 9, but made clear that an ERISA plan can not be *modified* by the doctrine of estoppel. *Law*, 956 F. 2d at 369-70.

The First Circuit noted that a narrow window for estoppel recovery might be possible where the representation relied upon reflected an *interpretation* of ambiguous plan terms, *Law v. Ernst & Young*, 956 F.2d 364, 370 n. 9 (1st Cir. 1992), *Id.*; and declared that

for any potentially successful claim of equitable estoppel, a plaintiff would first have to show that the company made "definite misrepresentations of fact" and believed that the plaintiff would rely on them; second, the plaintiff must "rely reasonably on the misrepresentation" to his detriment. *Mauser*, 239 F.3d at 57. This is a standard that petitioners herein would meet, because it was the employer's factual misstatement of the credited service date under the "one-time" "special" early termination package, rather than the existing ERISA plan, whose terms were being described.

III. It is Important That a Unified, Fair Standard Exist so that Employees and Employers alike may Know What their Rights are.

The unsettled state of the law renders employees especially vulnerable to real harm. In the current economic times, employers are widely downsizing by soliciting employees with early termination packages. Petitioners certainly believe that it is only fair to hold employers to the terms of packages they choose to offer, certainly where the offered terms are undisputed.

The risk that the offered terms may differ from the existing plan for normal retirements should be on the employer, who has engaged sophisticated counsel and accounting help for these efforts. Putting this risk on the employee, with a burden to show actual intent to deceive is unfairly onerous and likely impossible, even where it exists.

But employers are no less interested in having one uniform standard, to avoid different outcomes for employees in different circuits, who would simply file in the most favorable circuit in which the employer has a presence.

IV. This is An Important Question of Federal Law Because The Case Falls Squarely within the "Regulatory Vacuum" Previously Acknowledged By This Court.

This Court, in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) concluded that ERISA preempted state statutes and traditional state causes of action that are not recognized by ERISA legislation. Therefore, plaintiffs seeking traditional state law remedies for employer wrongdoing are deprived of these remedies because of ERISA's less than comprehensive regime.

Justice Ginsburg described the disconnect in her concurring opinion in *Davila*, 542 U.S. at 222-224: Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "virtually all state law remedies are preempted but very few federal substitutes are provided." *Id.* at 456, 457 (internal quotation marks omitted). A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief. First, in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court stated, in dicta: "[T]here is a stark absence-in [ERISA] itself and in its legislative history-of any reference to an intention to authorize the recovery of extracontractual damages" for consequential injuries. *Id.*, at 148, 105 S.Ct. 3085. Then, in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063 (1993), the Court held that § 502(a)(3)'s term " 'equitable relief'

. . . refer[s] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.*, at 256, 113 S.Ct. 2063 (emphasis in original).

Justice Ginsburg continued: "I also join 'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.' " *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (C.A.3 2003) (Becker, J., concurring).

* * *

Justice Ginsburg also recognized: As the array of lower court cases and opinions documents, *see, e.g., DiFelice; Cicio v. Does*, 321 F.3d 83 (C.A.2 2003), *cert. pending sub nom. Vytra Healthcare v. Cicio*, No. 03-69 [Reporter's Note: *See post*, 542 U.S. 933, 124 S.Ct. 2902], 72 USLW 3093 (2003), fresh consideration of the availability of consequential damages under § 502(a)(3) is plainly in order. *See* 321 F.3d, at 106, 107 (Calabresi, J., dissenting in part) ("gaping wound" caused by the breadth of preemption and limited remedies under ERISA, as interpreted by this Court, will not be healed until the Court "start[s] over" or Congress "wipe[s] the

slate clean"); *DiFelice*, 346 F.3d, at 467 ("The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable.").[4]

V. This is a Superior Vehicle for this Court's Consideration

The case at bar is an excellent vehicle for this Court's consideration. The facts of the case are undisputed, simple, straightforward and can be easily applied to the principles of whichever standard the Court chooses to adopt. Compared with the cases for other circuits, the admitted facts here are so strong that absent the Seventh Circuit's intent to deceive requirement, the employees here are entitled to the relief they request under any reasonably limited equitable estoppel rule. There being no dispute over the facts, this case provides a suitable platform for a pure determination of the federal question of law.

The fact that Plaintiffs were approached, solicited and induced by their employers who offered them a special retirement package that did not exist is more than merely bureaucratic sloppiness, which precludes an estoppel claim, as set forth the by the Seventh Circuit

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[4] *See also*, Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in *Russell*, *Mertens*, and *Great-West*, 103 Colum. L.Rev. 1317, 1365 (2003) (hereinafter Langbein) ("The Supreme Court needs to . . . realign ERISA remedy law with the trust remedial tradition that Congress intended [when it provided in § 502(a)(3) for] 'appropriate equitable relief.' ").

in *Coker*. *See* 165 F.3d at 585 (holding that administrator was not estopped from denying coverage, inasmuch as beneficiary did not reasonably rely on written mailings). Petitioners were led astray by a "generally disorganized and confusing scheme of repeated misinformation." *Kaliebe v. Parmalat USA Corp*, 2005 WL 711995, at *9 (N.D. Ill. March 28, 2005) (interpretation of Seventh Circuit standards for estoppel in employees claim for estoppel and equitable relief where claimant asserted employer was estopped from denying the obligation to pay Plaintiff monthly pension benefits).

CONCLUSION

The standards for equitable estoppel under ERISA are in need of resolution by this Court. Petitioners Kannapien and Rozhon respectfully request that this Honorable Court grant their Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED NOVEMBER 14, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-2543

GERI KANNAPIEN and JANICE ROZHON,

Plaintiffs-Appellants,

v.

QUAKER OATS COMPANY and PEPSICO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 6829—**Elaine E. Bucklo**, *Judge*

ARGUED SEPTEMBER 10, 2007
DECIDED NOVEMBER 14, 2007

Before EASTERBROOK, *Chief Judge*, and KANNE and EVANS, *Circuit Judges.*

Appendix A

KANNE, Circuit Judge.

Geri Kannapien and Janice Rozhon each accepted a severance package from their employer, the Quaker Oats Company, and retired a few weeks later. The severance package consisted of benefits to be paid pursuant to written plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Although Kannapien and Rozhon have received the amounts to which the express written terms of the plans entitle them, they filed suit against Quaker and its parent company, PepsiCo, seeking equitable relief under ERISA, *see* 29 U.S.C. § 1132(a)(3), alleging that Quaker failed to honor the terms of its Retirement Plan. The district court found that Kannapien and Rozhon had failed to produce any genuine issue of material fact that was in dispute and granted summary judgment for the defendants. *See Kannapien v. Quaker Oats Co.*, 433 F.Supp.2d 895 (N.D.Ill.2006). We agree and affirm the judgment of the district court.

I. HISTORY

Kannapien and Rozhon filed a class-action suit against Quaker and PepsiCo in late October 2004, alleging various claims under ERISA. In July 2005, the district court struck all class allegations because the case was not properly brought as a class action. The court granted leave to Kannapien and Rozhon to amend their complaint in November 2005 to add two Illinois state-law claims. After this amendment, Kannapien and Rozhon's complaint raised three classes of claims:

(1) ERISA estoppel claims under 29 U.S.C. § 1132(a)(3)(B); (2) ERISA claims for breach of fiduciary duty also under § 1132(a)(3)(B); and (3) Illinois state-law claims for breach of contract and promissory estoppel. After discovery, Quaker and PepsiCo moved for summary judgment, which the district court evaluated based upon the pleadings and affidavits submitted by the parties. The record before the district court established the following facts, which we construe drawing all inferences favor of Kannapien and Rozhon. *See Sides v. City of Champaign*, 496 F.3d 820, 822 (7th Cir.2007).

The Golden Grain Company operated a manufacturing plant in Bridgeview, Illinois, that produced consumer food products such as Rice-a-Roni and Mission Pasta. Golden Grain originally hired Kannapien and Rozhon as salaried employees on January 28, 1980, and May 16, 1977, respectively. Kannapien worked as an administrative assistant and Rozhon worked as a payroll and insurance clerk. During their employment at Golden Grain's Bridgeview Plant, Kannapien and Rozhon participated in the company's Profit Sharing Plan. Benefits under the Profit Sharing Plan consisted solely of financial contributions made by Golden Grain-employees did not make any monetary contributions.

Quaker Oats acquired Golden Grain in 1986, and Kannapien and Rozhon became employees of Quaker. Quaker did not immediately terminate Golden Grain's Profit Sharing Plan upon taking over, but eventually the

funds that had accrued under the Profit Sharing Plan were transferred into separate 401(k) accounts for the benefit of the employees. On July 1, 1990, all salaried employees of Golden Grain, including Kannapien and Rozhon, became participants in the Quaker Retirement Plan, an employee pension benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(2).

In 2001, Quaker merged with a subsidiary of PepsiCo, but retained the Quaker name. As a result of the merger, the Quaker Retirement Plan (as relevant to this litigation) was amended and restated on January 1, 2002. Benefits under the Retirement Plan are calculated using an employee's "credited service" time, which the Retirement Plan expressly states does not include any time an employee served before becoming a participant in the Quaker Retirement Plan. The amended Retirement Plan also entitles employees who were involuntary terminated by the company within two years of the merger to change-in-control benefits, which consist of additional monthly payments to eligible employees. The Retirement Plan does not define what constitutes an involuntarily termination.

In addition to the Retirement Plan, Quaker implemented a Severance Plan that also provided benefits to employees who were discharged involuntarily. Unlike the Retirement Plan, benefits under the Severance Plan are determined using a period of time that commences with an employee's date of hire by a company "acquired by Quaker." The benefits under the Severance Plan are unrelated to the basic benefits under

the Retirement Plan or to the change-in-control benefits provided under the Retirement Plan, except that both the Severance Plan benefits and change-in-control benefits are available only to involuntarily discharged employees.

In December 2002, both Kannapien and Rozhon received statements that estimated their basic pension benefits under the Retirement Plan. These statements each contained the disclaimer that they merely estimated Retirement Plan benefits and that they were not official Plan documents. The estimate statements further stipulated that "in the event of a conflict between this statement and the official Plan documents, the official Plan documents will govern."

The estimate statement sent to Kannapien contained a clerical error that listed her credited service as beginning on January 28, 1980-her hire date at Golden Grain. But under the express written terms of the Retirement Plan, Kannapien's credited service did not begin until July 1, 1990, the date she became a participant in the Quaker Retirement Plan. Similarly, Rozhon received an erroneous estimate statement that detailed her credited service as beginning on May 16, 1977, her hire date with Golden Grain, instead of the July 1, 1990 date. Despite listing incorrect credited service start dates, the estimate statements received by Kannapien and Rozhon used the proper time interval under the Retirement Plan's terms (from July 1, 1990 to December 2002) to accurately estimate the actual dollar amounts that each would receive under the Plan.

Appendix A

In 2003, following the sale of its Mission Pasta product line, PepsiCo began to decrease production at the Bridgeview plant. In light of this, the Plant Manager, Tom Winters, received approval to decrease the plant's labor costs. In order to reduce its workforce, Quaker offered to give its employees who volunteered for early retirement not only their standard benefits under the Retirement Plan, but also two additional benefits reserved for involuntarily terminated employees. Specifically, employees who elected for early retirement would be deemed eligible to receive benefits under the Severance Plan, as well as the change-in-control benefits under the Retirement Plan.

Accordingly, Winters held a meeting at the Bridgeview plant in early 2003, during which he stated that the company was looking for employees who would be interested in leaving. He directed interested employees to obtain information from Jeffrey Satterlee, the Human Resources Manager. Kannapien, who served as an administrative assistant to Winters, asked Winters if she should consider contacting Satterlee. Winters encouraged her to do so and told her that she "would be very pleased" by the amount she would receive if she left the plant. At the time he made this statement to Kannapien, Winters had no knowledge of the actual dollar amount of Kannapien's benefits.

Neither Kannapien, nor Rozhon, had considered retiring before 2003, but each contacted Satterlee after the plant meeting. Satterlee met with Kannapien and Rozhon separately and presented each with personalized

written documentation prepared by Quaker's Employee Administration Center, that described the additional benefits available to them if they retired early: namely, the change-in-control benefits under the Retirement Plan and the benefits under the Severance Plan. Nothing in the documents prepared by the Employee Administration Center stated anything about the basic benefits employees would receive under the Retirement Plan, nor did anything in these documents purport to supplant or modify the terms of the Retirement Plan. The documentation prepared by the Employee Administration Center informed Kannapien and Rozhon that the change-in-control benefits would be paid from the Retirement Plan and would be based on "years of service." While the documents did not define the term "years of service," the Retirement Plan stipulates that "years of service" include only relevant years for vesting purposes-the years of credited service, determined once an employee has begun participating in the Quaker Retirement Plan.

At his meetings with Kannapien and Rozhon, Satterlee did not discuss their respective standard benefits under the Retirement Plan, nor did Satterlee represent that the offer of additional Severance Plan and change-in-control benefits would alter the unambiguous language of the Retirement Plan. In fact, Satterlee told both women that he "couldn't calculate their pension benefit," and advised each of them to contact the Employee Administration Center to obtain an estimate. However, at his meetings with Kannapien and Rozhon, Satterlee mistakenly informed each of them that their

change-in-control benefits would be calculated based on their original Golden Grain hire dates instead of the proper date under the terms of the Retirement Plan, July 1, 1990. Kannapien and Rozhon admitted in separate depositions that Satterlee made an honest mistake in misstating the pertinent dates to them, and that they relied heavily on this mistake in deciding to retire.

After their meetings with Satterlee, Kannapien and Rozhon each agreed to retire so they could receive the additional Severance Plan and change-in-control benefits. Both women ended their employment with Quaker in late April 2003. For about a year after retiring, Kannapien and Rozhon each received benefits according to the terms of the Severance Plan: Kannapien received $47,800 and Rozhon received $42,250. Kannapien and Rozhon also admitted in their depositions that the receipt of these funds from the Severance Plan motivated their decisions to retire.

In May 2004, Kannapien and Rozhon each received a statement summarizing the remaining benefits owed to her under the Retirement Plan. These statements calculated both the basic and change-in-control benefits according to the terms of the Retirement Plan and awarded each woman benefits based upon 13.8951 years of credited service-the time span from July 1, 1990, until May 2004. Upon receiving these statements, Kannapien and Rozhon separately contacted Satterlee to express concern over the calculation of their benefits under the Retirement Plan because both women expected their credited service to be calculated using their hire dates

with Golden Grain. Satterlee, in turn, contacted the Employee Administration Center on behalf of Kannapien and Rozhon and also advised Kannapien and Rozhon on how to appeal the benefits calculations.

Kannapien and Rozhon appealed their respective benefits calculations to PepsiCo's Administration Committee in June 2004. Kannapien claimed that her Golden Grain service date should have been used in calculating both her basic benefits and the change-in-control benefits under the Retirement Plan; Rozhon challenged only the calculation of her change-in-control benefits under the Retirement Plan. In August 2004, the Administration Committee notified Kannapien and Rozhon separately, and in writing, that they were denying their appeals because: (1) Golden Grain employees did not become participants in the Quaker Retirement Plan until July 1, 1990; and (2) they had already received a retirement benefit for the preceding years-presumably the funds received pursuant to the Golden Grain Profit Sharing Plan. The letters also noted that the dollar amounts presented to Kannapien and Rozhon in the December 2002 estimate statements were properly calculated using the appropriate July 1, 1990 date.

After their appeals were denied, Kannapien and Rozhon commenced this litigation. In granting Quaker and PepsiCo's motion for summary judgment, the district court found that (1) Kannapien and Rozhon had not sufficiently alleged an ERISA estoppel claim because they relied largely on innocent, oral misstatements and

the language of the Retirement Plan is unambiguous, *Kannapien*, 433 F.Supp.2d at 904-05; (2) Kannapien and Rozhon had not properly raised an ERISA claim for breach of fiduciary duty because the suit had not been filed against any plan fiduciaries, *id.* at 907, and (3) Kannapien and Rozhon's state-law claims were preempted by ERISA, *id.* at 908.

II. Analysis

On appeal, Kannapien and Rozhon contend that they sufficiently raised an issue of material fact on each of the counts in their complaint. We will review the district court's grant of summary judgment *de novo*, viewing all facts in the light most favorable to the plaintiffs. *See Sperandeo v. Lorillard Tobacco Co., Inc.*, 460 F.3d 866, 870 (7th Cir.2006); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 631 (7th Cir.2004). While we have recently recognized that the "clearly erroneous" standard of review applies in an ERISA case if the summary judgment motion deals solely with the characterization of facts and neither party claims the right to a jury trial, the general standard of *de novo* review applies in this case. *See McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 575-76 (7th Cir.2007). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Appendix A

A. ERISA Estoppel Claims

Kannapien and Rozhon's first claim is for ERISA estoppel under 29 U.S.C. § 1132(a)(3). Kannapien and Rozhon concede that they have been paid benefits according to the written terms of the Retirement Plan; however, they seek to estop Quaker and PepsiCo from enforcing the express terms of the Plan because they allege that they detrimentally relied upon misstatements by Quaker employees in their decisions to retire. We agree with the district court that Kannapien and Rozhon do not raise any genuine issue of material fact with respect to their ERISA estoppel claim.

The written plan document ordinarily governs ERISA plan administration; statements or conduct by individuals implementing the plan can only estop an employer from enforcing the plan's written terms in "extreme circumstances." *Vallone,* 375 F.3d at 639; *Sandstrom v. Cultor Food Sci., Inc.,* 214 F.3d 795, 797 (7th Cir.2000); *see also Downs v. World Color Press,* 214 F.3d 802, 805 (7th Cir.2000). We have consistently required that modifications to an ERISA plan must be in writing because ERISA exists, in part, to protect the financial integrity of pension and welfare plans by confining the payment of benefits to a plan's written terms. *See Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr. Corp.,* 258 F.3d 645, 650 (7th Cir.2001); *Downs,* 214 F.3d at 805. As a result, in order to prevail on an estoppel claim under ERISA, we ordinarily require that plaintiffs show: (1) a knowing misrepresentation; (2) made in writing; (3) reasonable

reliance on that representation by them; (4) to their detriment. *Vallone*, 375 F.3d at 639; *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir.1999). Here, we see no basis upon which to grant estoppel to Kannapien and Rozhon as they fail to satisfy any required element of an ERISA estoppel claim.

First, Kannapien and Rozhon cannot prove that any Quaker employee knowingly misrepresented the terms of the Retirement Plan to them. *See Brosted v. Unum Life Ins. Co. of America*, 421 F.3d 459, 465 (7th Cir.2005). The December 2002 estimate statements did not contain any knowing misrepresentations. These statements inadvertently listed Kannapien's and Rozhon's respective hire dates; however, the district court determined that the record clearly established that these mistakes were solely clerical errors and not knowing misrepresentations. The record supports this conclusion because the written statements accurately reflected the dollar amounts that Kannapien and Rozhon would receive under the written terms of the Retirement Plan. At any rate, Kannapien and Rozhon concede that these clerical errors in the estimate statements were unintentional.

Further, the representations made to Kannapien and Rozhon by their Human Resources Manager, Satterlee—that their Golden Grain hire dates would be used in calculating their change-in-control benefits—were the product of an innocent mistake, not a knowing misrepresentation. Indeed, the record contains ample evidence to support this as well. Specifically, Satterlee

advised both Kannapien and Rozhon to consult the Employee Administration Center to obtain benefits estimates after telling them that he could not individually compute their benefits. Satterlee also sought to rectify his misinformation by contacting the Employee Administration Center on their behalf once he discovered his error. Kannapien and Rozhon also conceded in their depositions that they believed Satterlee made an honest mistake.

Finally, Winters's statement to Kannapien that she "would be pleased" if she considered taking early retirement does not constitute a knowing misrepresentation. In fact, we agree with the district court that this statement does not misrepresent anything about the terms of the Retirement Plan, *see Kannapien*, 433 F.Supp.2d at 902 n. 5, nor does it represent anything at all because this forward-looking statement was not a statement of fact, *see Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955, 961 (7th Cir.1998).

Likewise, Kannapien and Rozhon cannot point to any written misrepresentation by Quaker or PepsiCo. Oral misrepresentations may become grounds for ERISA estoppel only where plan documents are ambiguous or misleading. *Vallone*, 375 F.3d at 639; *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 587-90 (7th Cir.2000); *cf. Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir.2005) (approving use of extrinsic evidence to prove the meaning of language in ERISA welfare plan documents "only if the language of the plan document is ambiguous and the ambiguities are not clarified elsewhere in the document").

Here, both parties concede that the written terms of the Quaker Retirement Plan unambiguously stipulate that Kannapien's and Rozhon's credited service began on July 1, 1990, the date they became participants in the Plan. In light of the Retirement Plan's clear language, Kannapien and Rozhon must present a *written* misrepresentation to trigger estoppel. *See Bowerman*, 226 F.3d at 588 ("We have made clear in our earlier cases that the oral representations of an ERISA plan may not be relied upon by a plan participant when the representation is contrary to the written terms of the plan and those terms are set forth clearly."). In their brief and at oral argument, Kannapien and Rozhon focused almost exclusively on the oral statements made to them by Satterlee and Winters. Even if we agreed that these oral statements were misrepresentations (which we do not), they are insufficient grounds for estoppel. *See id.*

The only alleged written misrepresentations Kannapien and Rozhon cite are contained in the December 2002 estimate statements and in the Employee Administration Center documents provided to them by Satterlee in early 2003. But as we have already explained, these estimate statements merely contained a clerical error; they did not misrepresent the actual amounts that Kannapien and Rozhon were entitled to under the Retirement Plan. Beyond this, the estimate statements contained disclaimers that expressly stated that, in the event of a conflict, the written terms of the Retirement Plan would govern. Similarly, the Employee Administration Center documentation did not contain

any misrepresentations. These materials accurately explained that the change-in-control benefits would be paid out of the Retirement Plan. Although the Employee Administration Center documents left the term "years of service" undefined, it made reference to the Plan, which defines the term consistently throughout. Kannapien and Rozhon have not presented evidence of any inaccuracies in the Employee Administration Center documentation.

In an attempt to distinguish our precedent and evade the first two requirements of an ERISA estoppel claim, Kannapien and Rozhon rely heavily on our decision in *Bowerman v. Wal-Mart Stores,* where we applied estoppel based on innocent oral misrepresentations; however, a brief examination makes it clear that *Bowerman* is inapposite. *See id.* In *Bowerman,* we applied ERISA estoppel to Wal-Mart because its written health plan contained ambiguous provisions, and its employees made repeated incorrect statements that misled Bowerman into declining additional coverage provided under federal law. *See id.* Had Bowerman elected the additional coverage, she would have been entitled to medical expenses for a pre-existing condition upon her return to Wal-Mart. *See id.*

Three distinctions between this case and *Bowerman* are immediately apparent. First, and most critically, the written plan at issue in *Bowerman* contained ambiguous language, while it is conceded here that the Quaker Plan is unambiguous. Second, the plaintiff in *Bowerman* detrimentally relied on statements by employees, and

her reliance deprived her of benefits that she would have been eligible for *under the terms of the plan* had she made the additional-coverage election; here, it is uncontested that Kannapien and Rozhon received the full benefits to which the written terms of the Retirement Plan entitled them, regardless of any alleged reliance. Third, *Bowerman* concerned an employee health plan, while the instant case concerns a pension plan. *See Helfrich v. Carle Clinic Ass'n*, 328 F.3d 915, 918 (7th Cir.2003) (stating that unlike welfare benefits plans, ERISA requires pension plans to be very formal). We therefore see no reason to depart from the traditional rubric we use to evaluate the sufficiency of an ERISA estoppel set forth in *Vallone*. *See* 375 F.3d at 639.

Moreover, there is no evidence in the record of any reliance—detrimental or otherwise—by Kannapien or Rozhon either on the December 2002 estimate statements or on the Employee Administration Center documents in making their decisions to retire. In fact, Kannapien and Rozhon each acknowledged at separate depositions that the benefits under the Severance Plan, which were properly paid and are not at issue in this case, significantly motivated her decision to retire; each also admitted that she relied on the honest mistake conveyed to her orally by Satterlee. These admissions, even taking all facts in the light most favorable to Kannapien and Rozhon, make it impossible for either to prove that she relied on any written statement to provided to her by Quaker. *See Sides*, 496 F.3d at 822.

Kannapien and Rozhon further attempt to extricate themselves from the requisite elements of ERISA estoppel by arguing that they have not asserted their estoppel claims against the ERISA plan itself, but instead have raised an estoppel claim against Quaker and PepsiCo directly. Thus, they assert that they may estop Quaker and PepsiCo based upon honest, oral misstatements. We find this argument unavailing.

In their briefs and at oral argument, counsel for Kannapien and Rozhon characterized the benefits to which they were entitled as part of a "one-time-only-offer." This characterization by counsel conflated the change-in-control benefits paid out of the Retirement Plan with the benefits his clients already received under the Severance Plan. But it is clear from the record that the Severance Plan benefits have been paid in full and that they are not in dispute in this case. In fact, Kannapien and Rozhon have never challenged the calculation of those benefits—not even in their internal appeals to the PepsiCo Administration Committee. Contrary to counsel's suggestion, the benefits that Kannapien and Rozhon seek in this case are change-in-control benefits that must be paid out of the Retirement Plan, a pension plan under ERISA, and we have noted that when a plaintiff seeks to recover benefits under an ERISA Plan, such claims must be asserted against the plan and not against the employer. *See Helfrich*, 328 F.3d at 917 ("Claims based on the plan . . . must be enforced against the plan . . . .") Kannapien and Rozhon do not cite any authority for their attempted circumvention of our clear view that estoppel claims based upon alleged

oral misrepresentations cannot succeed when asserted against an unambiguous, non-misleading ERISA pension plan. *See Bowerman*, 226 F.3d at 588.[1]

Kannapien and Rozhon make one further argument. They argue that Quaker should not be allowed to enforce the written terms of the Retirement Plan because Quaker allegedly disregarded the plan's express language by offering Kannapien and Rozhon, who retired voluntarily, benefits that are reserved for "involuntary terminations" under the Retirement Plan. We agree with the district court that this argument is unpersuasive. *Kannapien*, 433 F.Supp.2d at 906. First, it is not clear that Quaker has deviated from the written terms of the Retirement Plan, as the term "involuntary termination" is not defined in the Retirement Plan. More importantly, Kannapien and Rozhon benefited from Quaker's departure from formalism: they received extra pay under the Severance Plan and extra money from the change-in-control benefits that they would not have been entitled to under the Retirement Plan's written terms. Kannapien and Rozhon cannot appeal to equity to obtain more than the written language of the Retirement Plan

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1. We pause here to note that this tactic attempts to substitute state-law estoppel principles for the ERISA framework. Such a tactic, if allowed, could raise serious questions with respect to ERISA's preemption of state law. *See* 29 U.S.C. § 1144(a). It could also raise doubts as to subject-matter jurisdiction in this case, where all parties are residents of Illinois and jurisdiction is based solely on federal questions arising under ERISA. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1332; 29 U.S.C. § 1132(a)(3).

allows. *See Shields v. Local 705, Intern. Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 905 (7th Cir.1999) (Posner, J., concurring).

Because the Retirement Plan unambiguously defines "credited service" as commencing on July 1, 1990 for both women, and because neither Kannapien nor Rozhon can prove that she relied on any knowing written misrepresentation by Quaker, we hold that there was no issue of material fact on the ERISA estoppel claim and that the district court properly held that Quaker and Pepsico were entitled to summary judgment as a matter of law.

B. ERISA Fiduciary Duty Claim

Next, Kannapien and Rozhon present ERISA claims for breach of fiduciary duty, also under 29 U.S.C. § 1132(a)(3). In order to prevail on a claim for breach of fiduciary duty under ERISA, a plaintiff must prove (1) that defendants are plan fiduciaries; (2) that defendants breached their fiduciary duties; and (3) that their breach caused harm to the plaintiffs. *Jenkins v. Yager*, 444 F.3d 916, 924 (7th Cir.2006); *Brosted*, 421 F.3d at 465. An ERISA plan fiduciary does not breach its fiduciary duties under ERISA by merely providing negligent misinformation about the contours of a Plan. *See Vallone*, 375 F.3d at 642; *Frahm*, 137 F.3d at 955.

Neither Satterlee nor Winters is a plan fiduciary under § 3(21)(A) of ERISA. *See* 29 U.S.C. § 1002(21)(A) ("[A] person is a fiduciary with respect to a plan to the

extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."). Clearly, Satterlee and Winters do not fit this statutory definition: nothing in the record suggests that either had any managerial, investment, or discretionary role in the Quaker Retirement Plan.

The only cognizable fiduciaries from the record are members of the PepsiCo Administration Committee and Employee Administration Center that served as Plan administrators. However, Kannapien and Rozhon have not sued either Committee or any of their constituent members. Moreover, there is no allegation that Quaker or PepsiCo intended to deceive Kannapien or Rozhon. Indeed, the only misinformation provided to Kannapien and Rozhon by the Plan administrators was contained in the December 2002 estimate statement that erroneously referenced Kannapien's and Rozhon's hire dates, but Kannapien and Rozhon concede that this mistake was merely a clerical error and therefore unintentional.

Additionally, Kannapien and Rozhon suggest that the misinformation provided to them by Satterlee may be attributed to the Plan administrators. Even looking past

the fact that the administrators are not a party to this suit, there is no precedent for this approach. Finding that Plan administrators may breach a fiduciary duty vicariously through the actions of a non-fiduciary would vitiate our requirement that an ERISA claim for breach of a fiduciary duty must be asserted against plan fiduciaries. *See Jenkins*, 444 F.3d at 924; *Bowerman*, 226 F.3d at 590-91. In any event, there is no evidence that Satterlee intended to deceive Kannapien or Rozhon. His mistake was honest, as we have previously explained.

C. State-Law Claims

Lastly, we turn to the claims under Illinois state law that Kannapien and Rozhon added to the final version of their complaint. These claims have no merit. Section 514(a) of ERISA states that ERISA supersedes "any and all State laws" that relate to "any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has consistently reminded us that ERISA's preemption of state laws as enunciated in § 514(a) is "clearly expansive," *see Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), and we have likewise interpreted the provision broadly, *see Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir.1992). Because of this statutory scheme, "[a] suit to enforce a claim for benefits under an ERISA plan can be brought only under ERISA; parallel state law remedies are preempted." *Rud v. Liberty Life Assur. Co. of Boston*, 438 F.3d 772, 777-78 (7th Cir.2006) (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 392, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002)). With their

Appendix A

Illinois contract and promissory estoppel claims, Kannapien and Rozhon pursue benefits to be paid from the ERISA Retirement Plan; therefore their state-law claims are preempted.

III. Conclusion

For the foregoing reasons, the judgment of the district court is Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED MAY 15, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 04 C 6829

GERI KANNAPIEN, JANICE ROHZON

Plaintiffs,

v.

QUAKER OATS COMPANY, a unit of PepsiCo, and Pepsico,

Defendants.

MEMORANDUM OPINION AND ORDER

This case arises out of the payment of voluntary retirement benefits to two employees of the Quaker Oats Company ("Quaker") at its Bridgeview, Illinois plant. Geri Kannapien ("Kannapien") began her employment with the Golden Grain Company ("Golden Grain") in 1977. Janice Rozhon ("Rozhon") began her employment at Golden Grain in 1980. Golden Grain produces a variety of consumer products, the most notable of which was

Rice-a-Roni, "the San Francisco Treat." The Quaker Oats Company ("Quaker") acquired Golden Grain in 1986. In 1990, Kannapien and Rohzon (collectively "plaintiffs") became participants in the Quaker Retirement Plan (the "retirement plan"). Prior to the acquisition, plaintiffs had participated in the Golden Grain Profit Sharing Plan. After the acquisition, that account rolled over into an account at Quaker separate from the retirement plan.

In 2001, PepsiCo, Inc. ("PepsiCo") acquired Quaker. According to the Quaker Retirement Plan, employees terminated non-voluntarily within two years of a change in control were entitled to certain change-in-control benefits ("CIC benefits") in addition to their standard pension payments under the plan. Specifically, these benefits included the payment of a temporary and a permanent supplement to the terminated employee. These CIC benefits were available to plaintiffs as a result of PepsiCo's acquisition of Quaker. In April 2003, shortly before the two year period elapsed, plaintiffs terminated their employment with Quaker. At the time of their retirement, Kannapien was employed as an Administrative Secretary and Rohzon was employed as an Human Resources Assistant.

The circumstances surrounding plaintiffs' termination are as follows: In March 2003, at a meeting of Quaker employees at the Bridgeview plant, the Bridgeview Plant Manager, Tom Winters, told the employees that, in order to cut costs, the company was offering special retirement benefits to those interested in terminating their employment. The employees were

instructed to contact Human Resources Manager Jeff Satterlee ("Satterlee") if they were interested. Plaintiffs each contacted Satterlee individually for more details regarding the early retirement benefits. Plaintiffs each met with Satterlee individually on multiple occasions at which time they were given more details about the benefits.

According to plaintiffs, at these meetings, Satterlee orally informed plaintiffs that if they terminated their employment prior to the two year change-in-control deadline, they would receive a combination of severance benefits, pension benefits, and temporary and permanent supplements all calculated based upon their total years of service dating back to their original hire date at Golden Grain. In describing the benefits to plaintiffs, Satterlee relied on the language contained in a document prepared for each plaintiff by the Quaker Employee Administration Center ("QEAC") dated March 14, 2003 (the "March 14 documents") describing the benefits each individual plaintiff would receive upon termination. The document provided details on the retirement, severance, vacation, medical and dental, life insurance, disability, and other benefits plaintiffs would receive. The part of the document describing retirement benefits made no representation about the standard pension payment, but stated that temporary and permanent supplements would be calculated using a formula based upon their "total service" or "years of service." The document specifically stated:

Appendix B

IX. Retirement Income Plan

If you were a participant in the Retirement Plan upon Change in Control (May 1, 2001), you are 100% vested in the plan, regardless of years of service. The Quaker Retirement Plan also provides for additional pension benefits for salaried persons who are terminated from active employment on or before May 1, 2003.

The additional benefits consist of one or more of the following:

A permanent supplement payable as early as age 55 of .25% multiplied by your Last Full Year of eligible earnings multiplied by your total service at the end of your inactive service period.

Employees who are at least 50 but not yet age 55 at the end of their active service and have 10 Years of Service will be eligible for a temporary supplement payable upon retirement (as early as age 55) to age 62 of $240 multiplied by their Years of Service through their inactive period.

Employees who are at least 55 but not yet age 62 at the end of their

> active service and have 10 Years of Service will be eligible for a temporary supplement payable upon retirement (as early as age 55) to age 62 of $360 multiplied by their Years of Service through their inactive period.[1]

"Years of Service" is not defined in that document. According to the language of the official retirement plan document, however, the pension and supplement payment were to be calculated according to plaintiffs' credited years of service. For plaintiffs, their credited years of service differed from their total years of service because they did not start receiving credited service until their enrollment in Quaker's retirement plan in 1990. Additionally, although plaintiffs volunteered to be terminated, Quaker allowed their terminations to be characterized as involuntary so that they would be eligible to receive the temporary and permanent supplements which, under the terms of the retirement plan, were only available to involuntarily terminated employees.

Plaintiffs accepted the early retirement benefits and their last day of active employment at Quaker was April

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1. The record suggests that the erroneous language found in this document derived from a 2002 memorandum distributed by Quaker's Director of Benefits and Payroll Administration, Brian Tischendorf. The record does not indicate who authored that memorandum, however.

26, 2003.[2] After leaving active employment, plaintiffs received approximately thirteen months of severance payments. The severance payments were calculated using their original start date with Golden Grain in accordance with the terms of the severance plan based upon their total years of service. In May 2004, plaintiffs received documentation in the mail regarding their pension and supplement payments. The documentation showed that these payments would be calculated according to the terms of the retirement plan using plaintiffs' credited years of service and not their total years of service. Plaintiffs contacted Quaker and then appealed the calculation of these benefits to the PepsiCo Administration Committee. Pepsi denied their appeals stating that their benefits were appropriately calculated with credited service dating back only to 1990.

The fourth version of plaintiffs' complaint (the third amended complaint) alleges five claims against defendants: 1) an ERISA estoppel claim to prevent Quaker from enforcing the terms of the plan; 2) an ERISA claim for breach of fiduciary responsibility; 3) a claim for violation of the "Anti-Cutback Rule" (already denied by this Court); 4) a claim for equitable estoppel; and 5) a state law breach of contract / promissory estoppel claim. Plaintiffs concede that their severance payments were correctly calculated and seek

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2. In addition to the aforementioned statements, plaintiffs also point to additional oral and written statements that they claim led them to believe that their pension and supplement payments would be calculated based upon their original hire date at Golden Grain. These statements will be discussed, *supra*.

only increased pension and supplement payments. Defendants filed a motion for summary judgment. Plaintiffs, in turn, responded with their own motion for summary judgment.

Summary judgment is appropriate where the record and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir.1999); Fed.R.Civ.P. 56©. I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party cannot rely upon unsupported assertions or speculation in order to meet its burden.

Appendix B

I. Estoppel Claims[3]

Plaintiffs admit that under the terms of the retirement plan they are not entitled to any more benefits than they have in fact received. Therefore, plaintiffs seek to enforce the representations made to them regarding the terms of the retirement plan through principles of estoppel. The Seventh Circuit has held that estoppel is available in an ERISA action only in limited circumstances. In order to establish an estoppel claim, plaintiffs must show 1) a knowing misrepresentation by defendants; 2) in writing; 3) with reasonable reliance by the plaintiff on the misrepresentation; and 4) that plaintiffs' reliance was to their detriment. *Downs v. World Color Press,* 214 F.3d 802, 805 (7th Cir.2000). A negligent misrepresentation is not sufficient to establish an ERISA estoppel claim. *Brosted v. Unum Life Ins. Co. of Am.,* 421 F.3d 459, 465 (7th Cir.2005) ("[A]rguments that negligent misrepresentations 'estop' sponsors or administrators from enforcing the plans' written terms

3. Although there is some confusion and redundancy in the complaint, plaintiffs, having conceded that they are not entitled to additional benefits under the terms of the plan, are not bringing an ERISA 29 U.S.C. § 1132(a)(1)(B) action. That subsection does not provide a remedy in this case. Any such claim would necessarily fail because the decision of PepsiCo's administrative committee to enforce the terms of the plan was not arbitrary and capricious. *See Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund,* 390 F.3d 1040, 1045 (7th Cir.2004). Instead, plaintiffs bring an estoppel claim which is properly characterized as an § 1132(a)(3) action (counts I and IV). *See Bowerman v. Wal-Mart Stores, Inc.,* 226 F.3d 574, 586 n. 7 (7th Cir.2000).

have been singularly unsuccessful.") (quoting *Decatur Mem'l Hosp. v. Connecticut Gen. Life Ins. Co.*, 990 F.2d 925, 926-27 (7th Cir.1993)). Incorrect oral statements cannot amend an ERISA pension plan or serve as the basis of an estoppel claim against an ERISA pension plan. *See Downs*, 214 F.3d at 805-06 ("[Plaintiff] cannot rely on the oral statements by [defendants] because the estoppel doctrine does not override the aforementioned rule proscribing oral modification of an ERISA plan."); *Frahm v. Equitable Life Assurance Soc'y of U.S.*, 137 F.3d 955, 961 (7th Cir.1998).

Plaintiffs attempt to establish their estoppel claims arguing that the following misrepresentations induced them to retire: 1) the oral representations made by Satterlee in their individual meetings stating that their pension and supplement payments would be calculated according to their total years of service; 2) the oral representations made by Satterlee and Tom Winters encouraging them to accept early retirement because it was a very good deal; 3) written statements from the Quaker Benefits Handbook; 4) a document entitled "Understanding Your Severance Benefits;" 5) a document from December, 20002 entitled "Personalized Information for [plaintiff]" sent to both plaintiffs that summarized their pension benefits; and 6) the March 14 documents provided by Satterlee to plaintiffs in their individual meetings with him.

These representations, viewed individually or as a whole, do not establish an actionable estoppel claim against a pension plan under the law of this Circuit as

articulated in *Downs* and *Helfrich v. Carle Clinic Assn., P.C.*, 328 F.3d 915, 918 (7th Cir.2003). Oral statements cannot serve as the basis of an estoppel claim for an ERISA pension plan. *See Downs*, 214 F.3d at 805-06. Only another plan document (such as a summary plan document or SPD) may estop a plan from enforcing the language in the official plan document. As the *Helfrich* court explained:

> The doctrine that the summary plan description prevails over the plan is a form of estoppel; to establish the limits of this doctrine is to establish the limits of estoppel. No matter what label applies, documents prepared by an employer do not supersede those documents that establish the terms of a pension plan. Whether, and to what extent, estoppel is available with respect to welfare benefit plans under ERISA is an issue on which the judiciary has not come to rest, compare *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955, 961 (7th Cir.1998), with *Shields v. Teamsters Pension Plan*, 188 F.3d 895 (7th Cir.1999), but with respect to pension plans (which by statute must be very formal) the only variance that any court has allowed depends on the plan's own writings, such as summary plan descriptions.

Helfrich, 328 F.3d at 918. Additionally, the facts of this case are analogous to those of *Downs*. In *Downs*, the court held that written and oral representations made

by an employer to an employee that he would receive greater credited service than he was entitled to under the actual terms of the company's plan could not estop the plan from enforcing the plan according to its terms.[4] I disagree with plaintiffs that the fact that Quaker first proposed the idea of retirement to plaintiffs distinguishes this case. While this fact may be relevant to plaintiffs' attempts to establish reliance, it does not alter the framework of analysis.

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4. Downs also failed to establish any detrimental reliance on the claimed misrepresentations. Plaintiffs attempt to establish detriment and damages in this case by arguing "[d]efendants failure to follow through on their promises, which induced Plaintiffs to act, was to Plaintiff's obvious detriment." Plaintiffs' argument is that the detriment / damage they suffered is the difference between the promised payments and the payments that they actually received. Obviously, plaintiffs are worse off than they would be if Quaker had paid them the additional benefits. These arguments, however, demonstrate a misunderstanding of the cause of action they have pled and the equitable remedies available to them. The appropriate inquiry is whether plaintiffs are worse off having retired than they would be had they remained in active employment. *See Frahm*, 137 F.3d at 961-62. Thus, in order to establish detrimental reliance, plaintiffs would need to show that 1) they actually would not have retired had they been correctly informed of the of the pension and supplement payment amounts 2) their decision to retire, which provided them with severance and supplement benefits that they otherwise could not have qualified for, and left them with the opportunity to engage in active employment elsewhere, put them in a financially worse position than they would have been had they remained in active employment.

First, plaintiffs cannot establish a claim for estoppel based upon the oral representations made to them by Satterlee and other Quaker employees because an estoppel claim cannot be based upon oral statements.[5] *See Downs,* 214 F.3d at 805-06. The undisputed record also establishes that these were only negligent misrepresentations. *Brosted,* 421 at 465. Moreover (with respect to the pension payments in particular), it is clear that Satterlee was attempting to explain the terms of the plan as he understood them, although he did so incorrectly. At no point did Satterlee represent that the terms of the retirement plan were being altered because plaintiffs were accepting an offer of early retirement. Therefore, it is unreasonable for plaintiffs to either rely on Satterlee's words to inform them of the terms of the plan, or for plaintiffs to argue that his words could override the written terms of the plan explaining eligibility to give them credit for service for a period of time that they were not enrolled in the plan.

Second, plaintiffs' estoppel claim as it is based upon written misrepresentations also fails. In their brief, plaintiffs argue reliance on parts of the Quaker Benefits Handbook, which states that it serves as a summary plan document (an "SPD"). If an SPD is in direct conflict with

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5. In addition, some of these statements do not even constitute misrepresentations. For example, Tom Winters statement "I think you owe it to yourself to make an appointment and look at the numbers because you're going to be very pleased" is not a misrepresentation about plaintiffs' credited service date or any other term of the plan. It simply does not contain a false statement of fact. *See Frahm,* 137 F.3d at 961.

the plan description, then the SPD would govern. *See Helfrich*, 328 F.3d at 918; *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir.1998) ("[A] participant or beneficiary [may] rely on an SPD and estop a plan administrator from denying coverage for terms found in the underlying policy only if there is a direct conflict between an SPD and the underlying policy."); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir.1991) ("There is not [a contradiction] in a case . . . where the policy clarifies rather than contradicts the summary."). The SPD will provide a basis for estoppel, however, only if the participant relied on its language. *See Helfrich*, 328 F.3d at 918 ("So the rule that summary plan descriptions, *if relied on*, trump the plan itself does not assist plaintiffs. . . .") (emphasis added).

A review of the portions of the SPD cited by plaintiffs and the record in this case indicate that estoppel based upon the SPD does not apply in this case. First, plaintiffs have brought forth no evidence (and I have found none in the record) that demonstrates that plaintiffs actually relied on the language of the SPD. I have read both plaintiffs' depositions and neither mentions the SPD as a basis for their decision.[6]

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6. In Kannapien's case, she even explicitly states that she relied exclusively on the information provided to her by Satterlee in making her decision. ("Jeff told me what I was getting, and I made that decision based on what he told me."). In Rohzon's case there is simply no evidence from which a fact-finder could conclude that she relied on the language in the SPD.

Second, even if plaintiffs could demonstrate reliance, the language cited by plaintiffs from the SPD (*see* Plaintiffs' statement of facts at ¶¶ 71-74) does not directly conflict with the plan language in the official plan document. The language found in the official plan document (Exhibit A to defendants' first motion for summary judgment) is not ambiguous or misleading with regard to the calculation of credited service.[7] Some of the language plaintiffs cite from the SPD as misleading does not even come from the retirement plan's SPD, but instead comes from the severance plan's SPD.[8] The severance plan *903 has a different definition of credited service and its SPD cannot create a conflict with the *retirement* plan's language. The other language cited by plaintiffs is general language from the retirement plan's SPD describing the calculation of credited service and does not address the issue of when a participant becomes eligible to start accruing credited service.[9] *Mers*, 144 F.3d

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7. The plan states that the calculation of pension benefits uses the years of credited service a participant has accrued. The plan further states that a participant may only accrue credited service for the years they are considered eligible employees under the terms of plan. According to the plan, salaried Golden Grain employees did not become eligible until the plan was extended to them on July 1, 1990.

8. Plaintiffs cite language from the *severance* plan stating "[u]nder this plan your credited service is your continuous calendar years of employment from your most recent date of hire with Quaker (or a company acquired by Quaker)."

9. The cited language states "to calculate your annual pension, Quaker uses two different formulas and pays the higher

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at 1024 ("If silence in the SPD were enough to trump the underlying plan, then SPDs would mushroom in size and complexity until they mirrored the plans."). Finally, the SPD indicates it is not intended to cover every situation and provides a disclaimer stating: "[w]e have made every attempt to summarize the documents and policies accurately and completely in the handbook. However, if there is an error in the handbook, or if a situation arises that is not described in the handbook, the official legal documents and policies will govern." *See Helfrich*, 328 F.3d at 916 ("[C]onflicts between this document and the plan itself are resolved in favor of the summary plan description (unless it alerts the reader to look for additional terms in the full plan)."); *Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1048 (7th Cir.2004) ("Larding the summary with minutiae would defeat that document's function: to provide a capsule guide in simple language for employees.") (quoting *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 984 (7th Cir.1992)).

Next, plaintiffs claim reliance on a document entitled "Understanding Your Severance Benefits." As defendants point out, this document applies to

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amount. The Credited Service Formula. Using this formula, your benefit is based on the number of years of credited service you earned while working for Quaker. The Earnings/Service Formula. Using this formula, your pension benefit is stated as the sum of your individual yearly benefit." Furthermore, it is logical that the description of the calculation presupposes that one is actually enrolled in the plan in order for it to apply.

distributions made under Quaker's severance plan. The March 14 documents (upon which plaintiffs claim reliance) clearly state that pension and supplements are paid from the retirement plan. Accordingly, these documents describing the severance plan do not contain a misrepresentation and do not provide a basis to estop the unrelated Quaker retirement plan.

Plaintiffs also argue that they relied on a December 2002 summary of pension benefits statement entitled "Personalized Information" that they each received. The document provided a synopsis of plaintiffs' estimated pension benefits at the time. The statements incorrectly listed plaintiffs' credited service as going back to their original hire dates, but provided plaintiffs with correct calculations of their estimated pension benefits.[10] The undisputed record establishes that the misstatement of plaintiffs' credited service date was a clerical error. It was not an intentional misrepresentation and cannot serve as the basis for an estoppel claim. *See Downs*, 214 F.3d at 806. Additionally, these statements have a disclaimer stating that "[t]his statement is not an official plan document and should not be considered a representation, contract or guarantee of any benefit or continued employment. In the event of a conflict between this statement and the official Plan documents, the official Plan documents will govern." Finally, the pension payment estimates contained in these documents are correct and plaintiffs do not suggest that they believed

10. The actual pension estimate displayed in the document was determined according to a calculation that utilized plaintiffs' correct July 1, 1990 credited service date.

the estimate was calculated inaccurately or was an understatement of their benefits. Therefore, any claim by plaintiffs that they reasonably relied on the incorrect credited service date in estimating their pension benefits is undermined. Plaintiffs' remaining argument (below) applies only to the supplement payments. Therefore, at this juncture, I grant defendants' motion for summary judgement with respect to the pension payments.

Plaintiffs also claim reliance on misrepresentations in the March 14, 2003 documents provided by Satterlee. These documents incorrectly stated that the supplements will be calculated based upon "Years of Service" or "total years" instead of a credited service date going back only to 1990.[11] "No matter what label applies, documents prepared by an employer do not supersede those documents that establish the terms of a pension plan." *Helfrich*, 328 F.3d at 918. Thus, this document does not supersede the unambiguous language of the plan regarding the calculation of the supplements based upon credited service dating back to 1990.[12] The

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11. The document itself makes no assertion as to the calculation of the standard pension benefits. Therefore, it is evaluated with regard to the payment of temporary and permanent supplements.

12. Plaintiffs have not shown that this document was an official plan document. The document came from QEAC, is signed by Satterlee, does not characterize itself as an official plan document, and provides a personalized description of benefits across numerous plans at Quaker. Therefore, plaintiffs have set forth no basis (nor have I found any in the record) upon which I

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undisputed record also establishes that this error was an unintentional clerical error and is therefore not actionable. *Brosted*, 421 at 465.[13]

In order to avoid this result, plaintiffs rely on *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir.2000). In *Bowerman*, the Seventh Circuit held that Wal-Mart's health plan was estopped from denying health benefits for a preexisting condition to a returning Wal-Mart employee because the plan's documents were ambiguous, and those documents, along with subsequent incorrect oral representations of various employees, misled the plaintiff into not electing COBRA coverage for the period. The election of COBRA coverage would have enabled Bowerman to receive coverage for the preexisting condition upon her return to Wal-Mart. The court considered the oral misrepresentations as part of the estoppel analysis because "the Plan, through its own actions, reinforced the confusion created by its own documents and consequently prevented plaintiff from paying the COBRA premium . . . ." *Id.* at 587. The court,

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could conclude that this was a plan document of the nature that could amend or estop the underlying plan language rather than a Company document.

13. At the meetings, Satterlee also made a series of written of ad-hoc estimations of the payments plaintiffs would receive using the in correct total years of service. For the same reasons, these incorrect written estimations, whether considered as an integrated part of the document or as separate representations, also do not estop the plan.

however, was explicit in stating that this exception was only applicable in cases where the plan language was ambiguous or misleading. The court stated:

> We have made clear in our earlier cases that the oral representations of an ERISA plan may not be relied upon by a plan participant when the representation is contrary to the written terms of the plan and those terms are set forth clearly. Here, that rule is not applicable because the Wal-Mart Plan documents are not free from ambiguity; indeed, they leave the employee in Ms. Bowerman's situation guessing as to the appropriate course of action. . . . Allowing estoppel when the documents are clear, moreover, would be inconsistent with the purpose of ERISA.

Id. at 588 (citations omitted) (also citing *Fink v. Union Cent. Life Ins. Co.*, 94 F.3d 489, 492 (8th Cir.1996), for the proposition that "written and oral misrepresentations could not serve as a basis of estoppel when plan documents were clear"); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 638 (7th Cir.2004) ("[W]e have found an exception when plan documents are ambiguous or misleading, in which case oral representations as to the meaning of documents may be relevant."). Additionally, the court in *Bowerman* found a valid estoppel claim even though there was no evidence of an intent to deceive.

Accordingly, I must determine if the facts of this case fall under the purview of *Bowerman.* I note, first, that this case involves a funded pension plan. The Seventh Circuit has consistently reserved ruling on the applicability of estoppel principles developed in cases involving single employer unfunded welfare benefit plans (e.g., the health plan in *Bowerman*) to funded pension plans (e.g., the plan in this case). *See e.g. Downs,* 214 F.3d at 806; *Krawczyk v. Harnischfeger Corp.,* 41 F.3d 276, 280 (7th Cir.1994). The court has stated that, due to concerns for the actuarial soundness of other types of plans, estoppel may not be appropriate. *See e.g. Coker v. Trans World Airlines, Inc.,* 165 F.3d 579, 585 (7th Cir.1999).

Assuming that estoppel principles may be considered in a funded plan situation, the facts are fundamentally distinct from *Bowerman.* In *Bowerman,* the court noted that "the 'basic policy consideration arguing in favor of applying estoppel is the principle of contract law that a party who prevents the occurrence of a condition precedent may not stand on that condition's non-occurrence to refuse to perform his part of the contract.'" *Id.* at 586 (quoting *Gallegos v. Mount Sinai Med. Ctr.,* 210 F.3d 803, 809 (7th Cir.2000)); *See also Swaback v. Am. Info. Techs. Corp.,* 103 F.3d 535, 542 (7th Cir.1996). In *Bowerman,* the ambiguous and misleading representations caused Bowerman to fail to make an election for benefits that she was otherwise entitled to receive. Had she been able to make an informed decision, she would have elected COBRA coverage. That is why the appropriate award in *Bowerman* was retroactive

reinstatement of COBRA coverage. On the other hand, in this case, according to the unambiguous terms of the retirement plan, plaintiffs could never have qualified for pension or supplement payments based upon their total years of service. Thus, rather than removing a procedural hurdle preventing plaintiffs from receiving substantive benefits that they are entitled to under the terms of the retirement plan, the application of estoppel in this case would have the effect of amending the substantive terms of the retirement plan in a manner not authorized by the terms of the plan. *See Downs*, 214 F.3d at 805.

Additionally, unlike *Bowerman*, the language found in the official retirement plan document is not ambiguous or misleading with regard to the calculation of credited service. *See* n. 9, *supra*. Plaintiffs do not argue otherwise or claim that they did not have access to this information. I have already determined that the SPD was not in direct conflict with the underlying plan document and was not ambiguous or misleading in its description of the retirement plan's calculation of credited service.

Last, without citing any authority, plaintiffs argue that defendants should not be able to strictly enforce the terms of the retirement plan because "the Company's resort to a 'strict language' of the Plan' defense is utterly disingenuous in light of the fact that [the retirement plan] by its terms, [was] applicable only to involuntary terminations" and "it is clear that Defendants will manipulate the benefits system whenever it suits them to do so." This argument is unpersuasive. Quaker allowed

plaintiffs' voluntary terminations to be characterized as involuntary so that plaintiffs could receive the temporary and permanent supplement payments that they otherwise were eligible for under the terms of the plan. There is no evidence in the record of a bad faith motive behind this decision and plaintiffs benefitted financially as a result. Moreover, even if Quaker's decision to pay plaintiffs the temporary and permanent supplements violated the terms of the retirement plan, that violation bears no relation to the cause of action in this case, which seeks to recover for an independent dispute over different plan terms.

For the above reasons, I grant defendant's motion for summary judgment on the remainder of plaintiffs' estoppel claim.

II. Fiduciary Duty Claim

Plaintiffs' second claim is for breach of fiduciary duty. To state an ERISA claim for breach of fiduciary duty, plaintiffs must establish: 1) that defendants are the plan fiduciaries; 2) that defendants breached their fiduciary duties; and 3) that the breach caused harm to the plaintiff. *Brosted*, 421 F.3d at 465.

Defendants argue that this claim must fail because § 1132(a)(3) only authorizes equitable relief and plaintiffs are seeking legal relief in the form of monetary damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). I agree with defendants that the relief requested by

plaintiffs, damages in the amount of the difference between what they were promised and what they received in pension and supplement payments, is properly characterized as legal damages. Plaintiffs' attempts to label these damages as something else does not change this fact. *Id.* This argument is not dispositive on this claim, however, because given the circumstances of this case, the court is capable of fashioning a different equitable remedy that would be permissible. *See* Section I n. 5, *supra.*

Turning to the merits of plaintiffs' claim, the first step is to identify the fiduciaries for the retirement plan. "In assessing whether a person can be held liable for a breach of fiduciary duty, 'a court must ask whether [that] person is a fiduciary with respect to the particular activity at issue.' " *Plumb v. Fluid Pump Serv.*, 124 F.3d 849, 854 (7th Cir.1997) (quoting *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir.1992)). In determining whether an individual acts as a fiduciary with respect to a particular activity "we must concentrate on the degree of discretion entrusted to that person." *Tegtmeier,* 390 F.3d at 1047. An individual who is not designated as a fiduciary may become one if he assumes the authority of a fiduciary. *See Plumb,* 124 F.3d at 855.

Plaintiffs make the unsupported assertion that "[i]n explaining the Plan terms to employees, defendants and their authorized agents (including Human Resources

manager, Jeff Satterlee) are fiduciaries . . . ."[14] Section 1.4 of the plan states "[t]he authority to control and manage the non-investment operations and administration of the Plan is vested in an Administrative Committee." The committee consists of four persons and § 11.1 of the plan specifically states that the committee may "determine conclusively all administrative questions arising under the Plan, including the power to determine the eligibility of employees and the rights of Participants and other persons entitled to benefits under the Plan and their respective benefits, to remedy any ambiguities, inconsistencies or omissions of whatever kind and make factual determinations" and "to direct all payments of benefits under the Plan."

Plaintiffs have chosen not to bring this suit against the administrative committee or anyone it has identified

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14. Plaintiffs have cited no law for the proposition that the defendants or Satterlee should be considered fiduciaries with regard to the specific activities in this case. While it is true that Quaker has named itself the plan administrator, this administrative authority is delegated to a four-person administrative committee. *See* discussion, *infra*. Plaintiffs make no attempt to undertake any legal analysis of defendants' liability given this set of circumstances by, for example, showing that others outside the committee were authorized to communicate as fiduciaries. The court has done this analysis, but notes that additional arguments may have been waived. "A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. . . . We will not do his research for him." *Pelfresne v. Williams Bay*, 917 F.2d 1017, 1023 (7th Cir.1990) (citations omitted).

as a member of the committee. Plaintiffs also have not established any link between the misrepresentations in this case and the administrative committee or its members for which defendants could be liable. For example, there is no evidence that a member of the committee "authorized, participated in, or had knowledge of" any misrepresentations. *Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 547 (7th Cir.1997). Additionally, the plan's written documents provided correct information and plaintiffs have not brought forth any evidence beyond speculation from which a reasonable fact-finder could conclude that a fiduciary "failed to exercise due care in hiring, retaining, or training the non-fiduciary agent for the tasks assigned [them]'." *Id.* at 548. Plaintiffs also have not shown that Satterlee, or any other individual implicated in this case, exercised any discretionary authority over the plan such that they should be considered a plan fiduciary and defendants liable for their conduct. Instead, the record demonstrates that the actions of these individuals fell squarely within the ministerial functions described in 29 C.F.R. § 2509.75-8. Furthermore, even if plaintiffs could establish the existence of a fiduciary, a breach of fiduciary duty claim premised on misstatements requires an intent to deceive. *Vallone*, 375 F.3d at 642 ("while there is a duty to provide accurate information under ERISA, negligence in fulfilling that duty is not actionable.") "[T]he employer must have set out to disadvantage or deceive its employees . . . in order for a breach of fiduciary duty to be made out." *Id.* In this case, plaintiffs concede that there is no evidence of an intent to deceive.

For the above reasons, I grant defendants' motion for summary judgment on plaintiffs' claim for breach of fiduciary duty.

III. State Law Claims

In their third amended complaint, plaintiffs have added a state law claim to enforce a severance agreement arguing that ERISA does not actually govern the matter before the court.[15] ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). *Pohl v. Nat'l Ben. Consultants*, 956 F.2d 126, 127 (7th Cir.1992). Plaintiffs are challenging the amount of payments made under the retirement plan. The March 14 documents (upon which plaintiffs claim reliance) clearly state that the pension and supplement payments will be made from Quaker's retirement plan. Plaintiffs have cited no authority which supports their argument that a challenge to these payments can be brought outside of ERISA. The fact that plaintiffs received payments from multiple plans (the retirement and severance plan) upon retirement does not change the

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15. Having based the jurisdiction of this court on the presence of an ERISA claim from the inception of case, plaintiffs' attempt to argue that state law, and not ERISA, governs their claims is perplexing. Such a finding would destroy the original jurisdiction of this court and require the court to dismiss this case for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1367. Contrary to plaintiffs' assertions, defendants' argument pointing out this jurisdictional issue is not "artful spin of the jurisdictional issues."

fact that the contested payments derive from the retirement plan. This claim is preempted and I grant defendants' motion for summary judgment.

Defendants have also requested an award of attorneys' fees on this claim. In *Stark v. PPM Am. Inc.*, the Seventh Circuit articulated that the test for application of the ERISA fee-shifting statute was to determine if "the losing party's position [was] substantially justified and taken in good faith, or was that party simply out to harass its opponent?" 354 F.3d 666, 673 (7th Cir.2004) (quoting *Bowerman*, 226 F.3d at 593 (citation omitted)). While plaintiffs' claim is ill-conceived and loses on the merits, I do not find plaintiffs' choice to bring the claim was made in bad faith and with the intent to harass defendants. Defendants' request for attorneys' fees is denied.

ENTER ORDER:

s/ Elaine E. Buckle
Elaine E. Buckle
United States District Judge

Dated: May 15, 2006

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 21, 2007

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 21, 2007

Before

Hon. FRANK H. EASTERBROOK, *Chief Judge*

Hon. MICHAEL S. KANNE, *Chief Judge*

Hon. TERENCE T. EVANS, *Chief Judge*

No. 06-2543

GERI KANNAPIEN and JANICE ROZHON,

Plaintiffs-Appellants,

v.

QUAKER OATS COMPANY and PEPSICO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 04 C 6829

Elaine E. Bucklo, *Judge.*

Appendix C

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc* and the judges of the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are DENIED.

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* Judge Ripple took no part in the consideration of this case.

Supreme Court, U.S.
FILED
JUL 7 - 2008
OFFICE OF THE CLERK

No. 07-1386

IN THE

Supreme Court of the United States

GERI KANNAPIEN AND JANICE ROZHON,
Petitioners,

v.

QUAKER OATS COMPANY AND PEPSICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS QUAKER OATS COMPANY'S AND PEPSICO'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an estoppel claim can be established with respect to an unambiguous ERISA pension plan based upon an admittedly innocent oral misstatement by an employee who was neither an administrator nor a fiduciary of the plan and who directed the claimants to consult the appropriate source for information concerning the benefits to which they would be entitled if they elected to accept early retirement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, PepsiCo, Inc. is the parent corporation of Quaker Oats Company. PepsiCo, Inc. has no parent corporation. PepsiCo, Inc. owns 100% of the stock of Quaker Oats Company. No publicly held company owns 10% or more of the stock of PepsiCo, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
I. The Facts	2
II. The District Court Proceedings	5
III. The Decision Of The Court Of Appeals	5
REASONS FOR DENYING THE PETITION	6
I. THE QUESTION ON WHICH PETITIONERS SEEK REVIEW IS NOT PROPERLY PRESENTED IN THIS CASE	7
A. Petitioners Failed To Establish Any Element Of Their Estoppel Claims	8
B. Even Under Petitioners' Characterization Of The Standards In Other Circuits, Their Claims Would Fail	9
II. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF ERISA ESTOPPEL TO THE CLAIMS ASSERTED BY PETITIONERS	12
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page

Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140 (2d Cir. 1999) 10
Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 15
Busby v. JRHBW Realty, Inc., 513 F.3d 1314 (11th Cir. 2008) 15
Coker v. Trans World Airlines, Inc., 165 F.3d 579 (7th Cir. 1999) 8
Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267 (11th Cir. 2005) 14
Crosby v. Rohm & Haas Co., 480 F.3d 423 (6th Cir. 2007) 15
Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994) 13
Devlin v. Transp. Commc'ns Int'l Union, 173 F.3d 94 (2d Cir. 1999) 16
Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 6
Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993) 13
Greany v. W. Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir. 1992) 14
Greifenberger v. Hartford Life Ins. Co., 131 F. App'x 756 (2d Cir. 2005) 16
Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310 (3d Cir. 1991) 13
HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross, 101 F.3d 1005 (4th Cir. 1996) . 12
High v. E-Sys. Inc., 459 F.3d 573 (5th Cir. 2006) 17
Kane v. Aetna Life Ins, 893 F.2d 1283 (11th Cir. 1990) 14

TABLE OF AUTHORITIES – continued

	Page
Kurz v. Phila. Elec. Co., 96 F.3d 1544 (3d Cir. 1996)	13
Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992)	11
Livick v. The Gillette Co., 524 F.3d 24 (1st Cir. 2008)	16
Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51 (1st Cir. 2001)	16
Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326 (9th Cir. 1996)	14
Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir. 1996)	16
Spink v. Lockheed Corp., 125 F.3d 1257 (9th Cir. 1997)	14
Trs. of Mich. Laborers' Health Care Fund v. Gibbons, 209 F.3d 587 (6th Cir. 2000)	15
Vallone v. CNA Fin. Corp., 375 F.3d 623 (7th Cir. 2004)	8

STATUTES

29 U.S.C. § 1001, *et seq.*	1
§ 1054(g)(1)	5
§ 1132(a)(3)(B)	6

IN THE

Supreme Court of the United States

GERI KANNAPIEN AND JANICE ROZHON,
Petitioners,

v.

QUAKER OATS COMPANY AND PEPSICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS QUAKER OATS COMPANY'S AND PEPSICO'S BRIEF IN OPPOSITION

Quaker Oats Company ("Quaker") and PepsiCo, Inc. respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Geri Kannapien and Janice Rozhon.

COUNTERSTATEMENT OF THE CASE

Petitioners, former employees of Quaker, brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and Illinois state law seeking additional pension benefits under the Quaker Retirement Plan. The district court granted summary judgment dismissing petitioners' claims. The Court of Appeals for the Seventh Circuit affirmed, finding that petitioners had failed to establish any of the required elements of an estoppel claim under ERISA. Petitioners assert that the Seventh Circuit's decision as to one of those elements – that a knowing or intentional

misrepresentation have been made – creates a conflict among the circuits and should be reviewed by this Court. No conflict is created by this case, however, because petitioners' failure to establish *any* of the elements of their claim required dismissal regardless of whether an intentional misrepresentation is required. Moreover, petitioners could not prevail under any of the formulations of the requirements for an ERISA estoppel claim which petitioners contend are used in other circuits. The petition should be denied.

I. The Facts

In early 2003, the Quaker Oats Company offered certain salaried employees who worked at a plant in Bridgeview, Illinois an opportunity for voluntary early retirement. If an employee accepted this opportunity, Quaker would treat the employee's early retirement as an involuntary termination, which would permit the employee to receive two types of benefits in addition to her normal retirement benefits. First, the employee would receive severance benefits under the terms of Quaker's Severance Pay Plan (the "Severance Plan"). Second, the employee would receive additional pension benefits under the change in control provisions of the Quaker Retirement Plan (referred to herein as "CIC" benefits). Under the terms of the Quaker Retirement Plan, the CIC benefits were payable to employees of Quaker whose employment was involuntarily terminated within two years after a change in control of Quaker, and a change in control had occurred when the stockholders of Quaker voted to approve a merger of Quaker into a subsidiary of PepsiCo, Inc. on May 1, 2001.

Petitioners were salaried, at-will employees at Quaker's Bridgeview plant. They volunteered for

early retirement pursuant to Quaker's offer, and Quaker terminated their employment in response. Petitioners' severance benefits were calculated under the terms of the Severance Plan, and their pension benefits, including their CIC benefits, were calculated under the terms of the Quaker Retirement Plan. The amounts payable under the Severance Plan and the amounts payable under the Retirement Plan depend in part upon a participant's years of credited service under each plan. Under the express terms of the Severance Plan, petitioners' employment at the Golden Grain Company, a company Quaker acquired in 1986, was included in the calculation of their credited service for severance pay purposes. In contrast, under the express terms of the Quaker Retirement Plan, petitioners' credited service for pension purposes began on July 1, 1990, the date they became participants in that plan.[1]

Petitioners do not dispute that their employment at Golden Grain was not credited service under the terms of the Quaker Retirement Plan. Instead, petitioners point to conversations they had with Jeffrey Satterlee, a manager at the Bridgeview plant, in which Satterlee mistakenly told them that the CIC benefits were to be calculated based on their years of employment with both Quaker and Golden Grain. It is undisputed that Satterlee's mistake was entirely innocent and that he did not intend to mislead petitioners. It is also undisputed that Satterlee, who was neither a plan fiduciary nor administrator (*see*

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[1] As the court of appeals explained, the pre-existing Golden Grain Profit Sharing Plan remained in effect for some time following Quaker's acquisition of Golden Grain and provided former Golden Grain employees with retirement benefits for the period prior to their 1990 enrollment in the Quaker Retirement Plan. Pet. App. 3a-4a, 9a.

Pet. App. 19a-21a), instructed petitioners to contact the Quaker Employee Administration Center to obtain their actual benefits estimates, because, he explained, he could not compute their benefits for them. Satterlee at no time suggested that the early retirement offer would change any of the terms of the Quaker Retirement Plan. *Id.* at 7a.

Petitioners also point to a benefits estimate statement each had received some months prior to the announcement of the early retirement offer, which listed their credited service date as the date they were originally hired by Golden Grain. It is undisputed that this was an inadvertent clerical error. *E.g.*, Pet. App. 12a. It is also undisputed that the estimated pension benefit amounts provided in these statements were calculated using the correct credited service starting date of July 1, 1990, and thus accurately reflected the pension benefits actually payable to petitioners under the Quaker Retirement Plan.

In connection with the early retirement offer itself, each petitioner was given a written summary of the elements of the offer, which explained that the CIC and other pension benefits were to be paid from the Quaker Retirement Plan. The written summary also explained that the benefits were to be based on "years of service," a defined term in the Retirement Plan that equates to credited service, which began on July 1, 1990 for petitioners.

After they left Quaker, petitioners realized that their pension benefits were calculated based upon their credited service beginning on July 1, 1990, as required under the Quaker Retirement Plan, and that their pension benefits did not take into account their prior employment with Golden Grain. They filed this lawsuit in response.

II. The District Court Proceedings

Petitioners' original complaint alleged estoppel and breach of fiduciary duty claims under ERISA. After petitioners were denied leave to amend their complaint to add a claim for violation of ERISA's "anti-cutback" provision, 29 U.S.C. § 1054(g)(1), they moved for (and were granted) leave to file a Second Amended Complaint. Petitioners subsequently sought (and were granted) leave to file their last complaint, the Third Amended Complaint, which added two Illinois state law claims to their previously-asserted ERISA estoppel and fiduciary duty claims.

The district court granted respondents' motion for summary judgment on all claims asserted in the Third Amended Complaint and entered final judgment. The district court held that petitioners had failed to support any elements of their claims under ERISA and that their newly-added state law claims were preempted. Pet. App. 23a-49a.

III. The Decision Of The Court Of Appeals

On appeal, the Seventh Circuit affirmed. Pet. App. 1a-22a, *reported at Kannapien v. Quaker Oats Co.*, 507 F.3d 629 (7th Cir. 2007). In accordance with long-settled law, the court of appeals noted that to prevail on an estoppel claim under ERISA, plaintiffs must show:

> (1) a knowing misrepresentation; (2) made in writing; (3) reasonable reliance on that representation by them; (4) to their detriment.

Id. at 11a-12a. The court then reviewed the facts in the light most favorable to petitioners and found that "they fail[ed] to satisfy any required element of an ERISA-estoppel claim." *Id.* at 12a. As the court

explained, "the Retirement Plan unambiguously defines 'credited service' as commencing on July 1, 1990 for both women, and ... neither Kannapien nor Rozhon can prove that she relied on any knowing written misrepresentation by Quaker." *Id.* at 19a. And, the court observed, it was undisputed that petitioners had received all benefits to which they were entitled under the Quaker Severance and Retirement Plans. *Id.* at 2a, 11a, 16a. With respect to the Illinois state law claims, the Seventh Circuit affirmed the district court's determination that those claims were preempted by ERISA because petitioners were "pursu[ing] benefits to be paid from the ERISA Retirement Plan." *Id.* at 21a-22a.[2] The Seventh Circuit subsequently denied petitioners' petition for rehearing and rehearing *en banc*, *id.* at 50a-51a, and their motion to stay issuance of the mandate.

REASONS FOR DENYING THE PETITION

The petition purports to present two questions for review by this Court – one regarding the scope of ERISA preemption, and the other the knowledge or intent element of a claim of estoppel under ERISA. Pet. i. As to the first question, petitioners present no analysis or argument whatsoever, offering only a single short restatement of the question itself. *Id.* at 4. No assertions of a circuit split or any other bases for review of this question are presented. In light of petitioners' failure to address this question, and particularly in light of the "'clearly expansive'" nature of ERISA's preemption of state law (*see Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001)),

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[2] The court also affirmed the summary judgment dismissing petitioners' fiduciary duty claims under 29 U.S.C. § 1132(a)(3)(B), Pet. App. 19a-21a, a ruling not addressed in the petition.

further consideration of this question is unwarranted, and respondents therefore will address only petitioners' second question, relating to ERISA estoppel.

As to this question, petitioners do present an argument for review, but their argument is wrong. Petitioners claim that the Seventh Circuit's determination that a plaintiff asserting an ERISA estoppel claim must establish a knowing or intentional misrepresentation is in conflict with decisions of the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. Pet. 5-7, 9, 11-13. But, petitioners failed to establish *any* element of their estoppel claims, not merely a knowing or intentional misrepresentation, and they do not challenge the lower courts' findings in that regard. Therefore, whether ERISA estoppel does or does not require a knowing misrepresentation is irrelevant to the disposition of this case. Moreover, because of their failure to establish any element of an estoppel claim, petitioners could not prevail under any of the alternative standards they propose. Finally, and in any event, the conflicts plaintiffs see among the circuits are illusory – nothing more than differences in wording that have no substantive effect upon the claims asserted here.

I. THE QUESTION ON WHICH PETITIONERS SEEK REVIEW IS NOT PROPERLY PRESENTED IN THIS CASE.

As a threshold matter, the issue petitioners ask this Court to review, *i.e.*, whether a misrepresentation must be knowing or intentional to create an estoppel under ERISA, was not necessary to the decision of the Seventh Circuit, and thus the disposition of that issue can have no impact on the ultimate result in this case. Moreover, even under petitioners'

characterization of the requirements for ERISA estoppel in other circuits, they could not prevail under any conceivable standard. For both of these reasons, the question raised in the petition is not properly presented for review.

A. Petitioners Failed To Establish Any Element Of Their Estoppel Claims.

To establish an estoppel claim under ERISA, plaintiffs were required to show (1) a knowing misrepresentation; (2) made in writing; (3) reasonable reliance on that representation; (4) to their detriment. Pet. App. 11a-12a (citing *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 639 (7th Cir. 2004); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. 1999)). The Seventh Circuit applied these requirements in determining that petitioners had failed to establish their ERISA estoppel claims.

Petitioners argue that one of the requirements imposed by the court of appeals – a knowing misrepresentation – is unwarranted and inconsistent with the law in other circuits. But, the court did not rest its decision solely on the admitted absence of any knowing or intentional misrepresentations. To the contrary, the court found, and petitioners do not dispute, that none of the other elements of ERISA estoppel had been established. The only alleged written misrepresentation was the erroneous credited service date on the benefits estimate statements delivered months before any mention of the early retirement opportunity. Because the benefits statements correctly calculated and reported the actual amount of each petitioner's estimated benefits, the court found that this was not a misrepresentation, but merely a clerical error. Pet. App. 14a. While Satterlee did make an oral misstatement, albeit a concededly innocent one, the

court held that because the terms of the Quaker Retirement Plan were not ambiguous or misleading, the oral misstatement could not form the basis for an estoppel claim. *Id.* at 14a. Finally, the court found no evidence of "any reliance – detrimental or otherwise – by [either petitioner]" on any alleged written misrepresentation. *Id.* at 16a; *see also id.* at 33a-34a & n.4 (no reasonable, detrimental reliance on any misstatements, oral or written). Therefore, regardless of any need to show a knowing or intentional misrepresentation, petitioners failed to establish an estoppel claim.

B. Even Under Petitioners' Characterization Of The Standards In Other Circuits, Their Claims Would Fail.

While petitioners largely mischaracterize the ERISA estoppel standards in other circuits or provide incomplete descriptions of those standards (*see* section II, *infra*), even under petitioners' own characterizations of the standards, their claims would fail. The requirement, or lack thereof, of a knowing or intentional misrepresentation would have no bearing on the disposition of petitioners' claims under any of the standards they present.

The undisputed facts here show nothing more than an innocent oral misstatement by a single Quaker employee, who told petitioners he could not compute their benefits and who instructed them to consult the designated internal source for information concerning employee benefit plans, the Quaker Employee Administration Center, to obtain a benefits estimate. Pet. App. 12a-13a. It is undisputed that the Quaker Retirement Plan itself and the Summary Plan Description are clear and unambiguous (*id.* at 13a-15a), and that the written description of the early retirement opportunity given to petitioners

accurately described its terms and made clear that the early retirement benefits were governed by the Retirement Plan (*id.* at 14a-15a). And, it is undisputed that petitioners received all benefits to which they were entitled under that Plan. *Id.* at 2a, 11a, 16a. On this record, petitioners cannot establish a claim for ERISA estoppel no matter how the test may be articulated in a particular circuit.

Petitioners place heavy reliance, for example, on what they say is the standard in the Second Circuit. According to petitioners, that circuit requires "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, (4) injustice if the promise is not enforced, and (5) 'extraordinary circumstances.'" Pet. 6 (citing *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999)). Putting the other elements to one side for the moment, petitioners cannot establish the threshold element – that respondents made a "promise" to them regarding the calculation of their benefits. The benefits estimate statements petitioners received had nothing to do with the early retirement opportunity and, in any event, correctly calculated petitioners' benefits based on the correct years of service. Nor was Satterlee's innocent misstatement a promise concerning petitioners' benefits. In fact, it is undisputed that Satterlee told each petitioner that he could not calculate the amount of her benefits and that she should contact the Quaker Employee Administration Center to obtain a benefits estimate. *Id.* at 12a-13a. Far from being a "promise," Satterlee's conversations with petitioners are exactly the type of "commonplace communication from employer to employee" that the Second Circuit has made clear *cannot* form the basis for an estoppel claim. *Aramony*, 191 F.3d at 151.

As petitioners concede, one of the required elements in each of the Third, Fifth, Sixth, and Ninth Circuits is reasonable and detrimental reliance. Pet. 7-10. As the lower courts found in this case, petitioners failed to establish any reasonable reliance – detrimental or otherwise – on any alleged misrepresentation. Pet. App. 16a, 33a-34a. With respect to the innocent oral misstatement by Satterlee in particular, petitioners cannot show that reliance would have been reasonable in light of the undisputed fact that the Quaker Retirement Plan is unambiguous and in light of Satterlee's caution that he could not calculate petitioners' benefits. *Id.* at 12a-13a, 33a-34a.[3]

In the Ninth and Eleventh Circuits, a plaintiff must show that the plan terms were ambiguous and that the misrepresentation concerned an oral interpretation of that ambiguity. *See* Pet. 8-9, 11. Similarly, petitioners assert that the First Circuit has "noted that a narrow window for estoppel recovery might be possible where the representation relied upon reflected an *interpretation* of ambiguous plan terms." *Id.* at 14 (citing *Law v. Ernst & Young*, 956 F.2d 364, 370 n.9 (1st Cir. 1992)). Here, petitioners have conceded that the terms of the Quaker Retirement Plan were neither ambiguous nor misleading (Pet. App. 14a, 15a).

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[3] The Third, Fifth, and Ninth Circuits, like the Second Circuit, also require "extraordinary circumstances" (Pet. 7-9), and petitioners have established nothing more than an innocent misstatement by a Quaker employee, who told petitioners that he could not compute their benefits. These circumstances are not "extraordinary" under any formulation of that element. Indeed, as petitioners point out (*id.* at 8 n.3), the Fifth Circuit has refused to find extraordinary circumstances where an oral representation was inconsistent with the clear terms of the plan.

Finally, petitioners acknowledge that estoppel is unavailable in the Fourth Circuit when "it would effect an amendment to a written ERISA plan." Pet. 12 (citing *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1010-12 (4th Cir. 1996)). Given that the unambiguous terms of the Quaker Retirement Plan provide that petitioners' credited service began on July 1, 1990, a fact petitioners concede (Pet. App. 14a), petitioners' claims for benefits using earlier credited service dates, if successful, would necessarily "effect an amendment to a written ERISA plan."

In the end, this case, involving an innocent oral misstatement concerning the calculation of credited service pursuant to the terms of an unambiguous ERISA plan, does not present the question on which petitioners seek review – whether an ERISA estoppel claim requires proof that a misrepresentation was knowing or intentional. Because petitioners cannot prevail under any standard, regardless of the answer to this question, the petition should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF ERISA ESTOPPEL TO THE CLAIMS ASSERTED BY PETITIONERS.

As noted above, the elements of an ERISA estoppel claim as articulated by the Seventh Circuit are (1) a knowing misrepresentation, (2) made in writing, (3) on which the plaintiffs reasonably relied, (4) to their detriment. Pet. App. 11a-12a. These are the same elements recognized and applied in every circuit cited by petitioners. While different circuits use different verbal formulations when articulating the requirements for an ERISA estoppel claim, petitioners have not identified any differences that matter for purposes of their claims. In particular,

although some circuits use the rubric of "extraordinary circumstances," while others articulate a separate, stand-alone element, every circuit that has squarely addressed the question requires some form of knowing or intentional misrepresentation as a predicate for an estoppel claim under ERISA. Those circuits that have not imposed that requirement simply have not confronted the issue.

The Third Circuit, for example, requires a plaintiff to establish "extraordinary circumstances" in addition to the other elements of an estoppel claim (*i.e.*, material misrepresentation, reasonable reliance, detriment to plaintiff). *See, e.g., Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994), cited at Pet. 8. The Third Circuit explained the "extraordinary circumstances" requirement in *Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996), where it held that "extraordinary circumstances" ordinarily require "affirmative acts of fraud or similarly inequitable conduct by an employer."[4] An estoppel claim will not lie for "simple ERISA reporting errors or disclosure violations," including even omissions that cause employees to lose or to fail to qualify for benefits. *Id.* (citing *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1142 (3d Cir. 1993); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991)). An innocent, one-time

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[4] The Third Circuit noted in *Kurz* that it also has found extraordinary circumstances based on a "network of misrepresentations that arises over an extended course of dealing between parties" and that it considers "the vulnerability of particular plaintiffs" (*e.g.*, hospital patients erroneously told, while hospitalized, that they had adequate medical coverage). 96 F.3d at 1553. Neither a "network of misrepresentations" nor particular vulnerability was alleged or shown here.

misstatement, such as that at issue here, cannot support an ERISA estoppel claim in the Third Circuit.

Nor can it do so in the Ninth Circuit, which also requires "extraordinary circumstances." The Ninth Circuit decisions cited by petitioners, *Spink v. Lockheed Corp.*, 125 F.3d 1257 (9th Cir. 1997), and *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326 (9th Cir. 1996) (per curiam), both rest on that court's earlier decision in *Greany v. Western Farm Bureau Life Insurance Co.*, 973 F.2d 812 (9th Cir. 1992), which set out the elements of an equitable estoppel claim concerning an ERISA plan. *See Spink*, 125 F.3d at 1261; *Pisciotta*, 91 F.3d at 1331. Those elements include proof that "the party to be estopped" – that is, the party who made the alleged misrepresentation – "must know the facts." *Greany*, 973 F.2d at 821. In other words, a knowing misrepresentation is required.

Eleventh Circuit precedent is to the same effect. Petitioners cite *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 2005), for the proposition that the Eleventh Circuit "requires only an oral statement and representation which constitutes an oral interpretation of the plan, without requiring intent to deceive," Pet. 11, but petitioners' description of the required elements is incomplete. The standard for ERISA estoppel was first articulated in the Eleventh Circuit in *Kane v. Aetna Life Insurance*, 893 F.2d 1283 (11th Cir. 1990). In that case, the court held that where the provisions of the ERISA plan are ambiguous, and representations are made that constitute an interpretation of the ambiguity as opposed to oral amendments or modifications of the plan, then "[t]he federal common law of equitable estoppel may be applied to the facts

of [the] case." *Id.* at 1286. "The elements of equitable estoppel, as defined by federal common law," include "(1) the party to be estopped misrepresented material facts; [and] (2) the party to be estopped was aware of the true facts ...." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008). Thus, again, an estoppel can arise only where a knowing misrepresentation is shown.

The Sixth Circuit's formulation is virtually identical. That court requires, among other things, conduct or language amounting to a misrepresentation of material fact and an awareness of the true facts by the party to be estopped. *See Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991), cited at Pet. 10; *see also Trs. of Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir. 2000). If the party making the misrepresentation, *i.e.*, the party to be estopped, is aware of the true facts, then that party has made a knowing misrepresentation. *See also Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007) ("Far from trying to deceive Allred.... [a]t most, Crosby has shown that the company made an honest mistake, that in other words it was guilty of misfeasance, not the malfeasance that estoppel requires.").

Although petitioners also point to the First, Second, Fourth, and Fifth Circuits as having adopted rules that conflict with the Seventh Circuit's decision, in reality only the Second Circuit has considered ERISA estoppel in any depth. As petitioners note, the Second Circuit requires "extraordinary circumstances" – in particular, that a promise be made with the specific intent to induce the employee to take action favorable to the employer. Pet. 6-7. As that court has explained, the "extraordinary circumstances" element "require[s] conduct

tantamount to fraud," making clear that reliance on an employer's innocent misstatement will not suffice. *Greifenberger v. Hartford Life Ins. Co.*, 131 F. App'x 756, 759 (2d Cir. 2005) (citing *Devlin v. Transp. Commc'ns Int'l Union*, 173 F.3d 94, 101-02 (2d Cir. 1999)).[5]

The remaining circuits listed by petitioners – the First, Fourth, and Fifth – simply have not addressed in any fashion whether the misrepresentation that forms the basis for an ERISA estoppel claim must have been made with knowledge of falsehood or intent to deceive. Petitioners acknowledge as much concerning the First Circuit, noting that it "has not yet definitively chosen a position." Pet. 13 (citing *Livick v. The Gillette Co.*, 524 F.3d 24 (1st Cir. 2008)).[6] The First Circuit has suggested in *dictum* that, *if* it were to consider an ERISA estoppel claim, it would require "'definite misrepresentations of fact,'" *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 57 (1st Cir. 2001), but it has not yet considered such a claim, and what constitutes a "definite misrepresentation of fact" is therefore unknown. The Fourth Circuit, as noted *supra* at 12, does not permit an estoppel claim where the requested estoppel would effect an amendment to

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[5] *Greifenberger* is consistent with *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996), the case in which the Second Circuit first articulated the "extraordinary circumstances" requirement. There, as the court explained in *Devlin*, the employer had "intentionally used the promise of severance benefits to win Schonholz's resignation, and then reneged once she resigned." *Devlin*, 173 F.3d at 102.

[6] Petitioners assert that First Circuit panels have recognized "the direct split among circuits," Pet. 14, but the discussion they cite concerns whether an ERISA estoppel claim should be permitted at all, not the elements of such a claim.

a written ERISA plan. Finally, the Fifth Circuit, like the Second, Third, and Ninth Circuits, requires "'extraordinary circumstances.'" *See High v. E-Sys. Inc.*, 459 F.3d 573, 579 (5th Cir. 2006). The Fifth Circuit has not addressed whether a knowing or intentional misstatement is required for an ERISA estoppel claim. It has, however, looked to Third Circuit caselaw for guidance concerning "extraordinary circumstances," *see id.* at 580 & n.3. In the Third Circuit, as noted above, a negligent misstatement will not suffice.

So, far from showing a clear conflict warranting this Court's attention, petitioners have established only that some circuits have addressed the knowing misrepresentation question and others have not and that, among those that have, differences in phrasing can be found. That such differences exist is hardly surprising in light of the fact-specific nature of estoppel claims. What matters for present purposes is that, substantively, there is neither conflict nor confusion in the lower federal courts concerning any question properly presented here. Under no circumstances can a claimant prevail on an ERISA estoppel claim based on an innocent oral misstatement by a non-fiduciary, non-administrator who directs claimants to the proper source for information concerning an unambiguous ERISA pension plan.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GERI KANNAPIEN, *et al.*,

Petitioners,

v.

QUAKER OATS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Respondents' recreation of the question misstates the nature of the case.

Petitioners do not seek to establish an estoppel claim against an existing unambiguous ERISA pension plan. Rather, petitioners assert an estoppel claim against the employer to enforce the terms of a "special" "one-time only" early retirement package, only part of which included pension plan benefits, in the employer-initiated solicitation of voluntary terminations, misdescribed by the employer's designated spokesman, who admitted describing the package's benefits as all dating from the employees' original hire date.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
I. Petitioners *Can* Establish A Promise	2
II. Plaintiffs Did Reasonably and Detrimentally Rely on Quaker's Offer	3
III. Defendants' Denial of The Clear Circuit Split is Tautological and Wrong	5
A. Defendants Concede that the Second Circuit Standard Conflicts with the Seventh Circuit Standard and Ignore that the Employer-Initiated Solicitation Satisfies Any "Extraordinary Circumstances" Standard	5
IV. This Case Does Present an Excellent Vehicle for This Court's Review	6
V. Defendants Ignore the Impact of This Court's Recent Ruling in *Metropolitan Life v. Glenn*	7

TABLE OF CITED AUTHORITIES

Page

Cases

Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001) 5

Busby v. JRHBW Realty, Inc., 513 F.3d 1314 (11th Cir. 2008) 6, 7

Cotton v. Massachusetts Mutual Life Insurance Co., 402 F.3d 1267 (11th Cir. 1990) 6

Crosby v. Rohm, 408 F.3d 423 (6th Cir. 2007) ... 6

Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir. 2001) 5

Greany v. Western Farm Bureau Life Insurance Co., 973 F.2d 812 (9th Cir. 1992) .. 7

Kane v. Aetna Life Insurance, 893 F.2d 1283 (11th Cir. 1990) 7

Kurz v. Phila. Elec. Co., 96 F.3 1544 (3d Cir. 1996) 6

Metropolitan Life v. Glenn, 128 S.Ct. 2343 (2008) 7, 8

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) 8

Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir. 1996) 5

Petitioners Geri Kannapien and Janice Rozhon ("Petitioners or Plaintiffs") respectfully submit this reply to Quaker Oats Co. and PepsiCo's ("Respondents" or "Defendants") brief in opposition (Opp. at __) to the petition for a writ of certiorari.

Respondents' misstatement of the question and the case is shocking, no more honest with this Court than was their treatment of employees.

Petitioners do not "seek . . . additional benefits under the Quaker Retirement Plan." Opp. at 1. They seek what their employer, speaking through its designated H.R. spokesperson Jeff Satterlee, admittedly promised them in soliciting employees to voluntarily retire early—a three-part "one-time-only" "special" package, all parts dating from the person's original hire date. Petitioners sought this against the soliciting employer, not against the Plan.

Indeed, as presented below, the employer's resort to the "strict terms of the plan" defense is ironic and disingenuous since it was only discovered in the litigation that part of the benefits, the Change in Control portion (by their terms available only to employees who were involuntarily terminated after Pepsico's acquisition of Quaker, Opp. at 2-3) were part of the package only by the employer's falsely recharacterizing the voluntary terminations as involuntary.

Respondents' portrayal of Mr. Satterlee as merely "a manager" and "neither a plan fiduciary nor administrator," Opp. at 3, itself reinvents the record and ignores that he was the employer's designated spokesperson to answer questions about the package.

Indeed, he unequivocally admitted that he had explicitly presented the package as dating in all respects from the employees' original Bridgeview plant hire date.

No more honest is Respondents' minimizing their written explanation documents that also stated each Petitioners' "credited service date" as Petitioners' original hire dates as "inadvertent clerical error." Opp. at 4.

Respondents' arguments for denying the petition, Opp. at 6, are similarly misstated, asserting that Petitioners could not support any other elements of estoppel, based on: (1) asserting lack of reasonable reliance by mischaracterizing Petitioners as asserting claims with respect to the "unambiguous Quaker Severance Plan", rather than the "special" "one-time only" early retirement package, whose terms were explained by H.R. Manager Satterlee and the supporting documentation as dating from petitioners' original hire date; and (2) arguing lack of their detriment from taking the early retirement plan, by comparing the benefits from being fired, rather than from continuing their employment. Opp. at 8-9.

I. Petitioners *Can* Establish A Promise

Defendants' first argument, that Plaintiffs cannot establish a promise, ignores the record's clear showing that Plaintiffs' early retirement decisions were solely the desired product of the explicit employer-initiated solicitation to retire early for a promised three- part package, with *all* parts credited from the original hire date. While Satterlee *was* unable to determine the exact *amount* of Ms. Kannapien's pension at that time, he readily acknowledged having explicitly assured her that it would be based on her actual salary and her total years

of service *dating from her original hire date with Golden Grain*, (R. #108 p. 6-7, Ex. 2; R. #115: Attch. 6 p. 79, 82) and everyone acknowledges that it was based on this representation made by Quaker's dedicated H.R. "explainer", Satterlee that Plaintiff Kannapien retired.

Identically, in Rozhon's informational conferences with designated HR manager Satterlee, Quaker represented to Plaintiff Rozhon that her benefits would date from her original hire date, adding that Ms. Rozhon should accept the package because it was probably the last package that would be offered by Quaker, that PepsiCo would not be offering anything, (R. #115: Attch. 7 p. 92-93, 120) and based on the original hire date assurance at this meeting, Plaintiff Rozhon also retired early.

II. Plaintiffs Did Reasonably and Detrimentally Rely on Quaker's Offer

Second, Defendants' assertions that Petitioners' reliance on Quaker's acknowledged misrepresentation, not contained in the strict plan terms is unavailing for three reasons. First, the special package was not presented as "an" or "the" existing plan. Second, the documents Quaker provided Petitioners also showed their original hire date as the credited service date. Third, the Change In Control portion of the package was based, unbeknownst to the solicited employees, on repapering their voluntary terminations as involuntary.

Thus, the employees' reliance was eminently reasonable because they were relying on the *package* presented, supported by written material with their original hire date, and the Company was ignoring the strict plan terms for the package being offered. Whether on clean hands or mere equitable considerations, the Company's resort to the strict plan terms ought to be unavailing in such a case.

The relevance, that both loved their jobs and would otherwise have continued their employment at Quaker, is that the detriment of taking the package should have been compared with their continuing to work and accrue benefits, not, as the court below reviewed it, with their being involuntarily terminated.

The assertion that petitioners could not show reasonable and detrimental reliance, under the other circuits' standards, Opp. at 10-11, rests only on Quaker's standard plan as unambiguous and Sattlerlee's inability to calculate the amount of the benefits; ignoring that petitioners' claim differently arises from the "special", "one-time only" package employer-solicitation, explicitly misrepresented as dating from petitioners' original hire date.

Plainly, the Petitioners relied on Quaker's misrepresentations and retired early. Ultimately, that reliance would cost the now-retired Plaintiffs over $100,000 each.

III. Defendants' Denial of The Clear Circuit Split is Tautological and Wrong

A. Defendants Concede that the Second Circuit Standard Conflicts with the Seventh Circuit Standard and Ignore that the Employer-Initiated Solicitation Satisfies Any "Extraordinary Circumstances" Standard[1]

Defendants simply cannot sidestep the circuit split and Petitioners satisfaction of every "extraordinary circumstances" test. The Second Circuit has found extraordinary circumstances in cases where an employer reneged on a promise made with the intention of inducing employees to take actions benefiting the employer, such as joining the company or accepting early retirement. *See Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 101 (2d Cir. 2001); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 86-87 (2d Cir. 2001); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 80 (2d Cir. 1996).

Quaker's misrepresentations to Petitioners were employer-initiated for the sole purpose of inducing Petitioners to voluntarily retire early, for Quaker to obtain cost reductions by "downsizing." In this context, the burden of showing "intent to deceive" should not be placed on employees. The information that Petitioners needed to make a fully informed decision was in the sole hands of Quaker. Indeed, Quaker forfeited any

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1. Importantly, Respondents argue that there is no circuit split, yet concede that the Ninth and Eleventh Circuits have a different standard than the Fourth Circuit, which in turn has a different standard than the Seventh Circuit. Opp. at 11-12. And, they tacitly admit that there is a conflict between circuits that have decided estoppel claims, but "only the Second Circuit has considered ERISA estoppel in any depth." Opp. at 15.

right to presumption since the record shows the misrepresentations made to Petitioners were done without any effort to either determine or verify the terms being offered.

Further, while Defendants, Opp. at 13-14, agree that "extraordinary circumstances" are needed to satisfy the Third, Eleventh and Sixth Circuit standards and cite to *Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996); *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 1990); and *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008) *Crosby v. Rohm*, 408 F.3d 423, 431 (6th Cir. 2007), Defendants ignore that Petitioners amply meet the requirement of "similarly inequitable conduct" that is imputed in the "extraordinary circumstances" inquiry, and the misstatements to Petitioners were not "simple ERISA reporting errors." Rather, they were misrepresentations that induced Petitioners into early retirement.

IV. This Case Does Present an Excellent Vehicle for This Court's Review

Indeed, what sets this case apart from most, and makes this an ideal vehicle for addressing this issue is the designated spokesperson's rare and honest admission that he had explicitly represented the package as dating in all respects from Mmes. Kannapien's and Rozhon's original hire dates.

Additionally, Respondents' argument ignores that the terms of the employer-initiated solicitation package were at least as "ambiguous" as the 9th and 11th Circuits' requirements, because the employer initiated

solicitation package was not a finite unambiguous plan. Rather it was a cobbled-together pastiche of part plan, part papered-over unavailable Change in Control payments, plus an additional non-plan offering, all of whose terms were not even known to the managers/officers presenting or explaining them. In this context, the misstatements were hardly "innocent." Opp. at (i), 8, 9, 12, and 17 . Rather, they were at least negligent, more appropriately labeled *reckless* and with complete disregard as to what the terms of the employer solicitation actually were.[2]

V. Defendants Ignore the Impact of This Court's Recent Ruling in *Metropolitan Life v. Glenn*.

The other point not addressed by Respondents' July 7, 2008 opposition, is the issue raised by this court's June 19, 2008 decision in *Metropolitan Life v. Glenn*, 128 S. Ct. 2343 (2008), in which the adverse decision by a plan administrator who is both evaluator and payor is a factor to be used in evaluating the administrator's decision.

In context here, it would be a basis for summary remand for reconsideration by the courts below, of PepsiCo's Administration Committee's rejection of Petitioners' claim, since the composition of the Committee was exclusively PepsiCo employees who were charged with determining whether to approve a claim

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2. Defendants' reliance on *Greany v. Western Farm Bureau Life Insurance Co.*, 973 F.2d 812, 821 (9th Cir. 1992); *Kane v. Aetna Life Insurance*, 893 F.2d 1283 (11th Cir. 1990); and *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008) is puzzling. Neither *Greany* nor *Kane* discussed Defendants' supposed "knowledge" requirement, and *Busby* is a case that does not even involve ERISA.

adverse to their employer. The pressure that these persons were under was itself demonstrated by the tearful admission by PepsiCo's liaison to the plan administrator, Kiren Kabat that she thought something should be done for Plaintiffs-Petitioners here if the company legally could.

This is precisely the situation — where the administrative committee "decider" is composed solely of the payor's mid-level employees in which the administrator's conflict is squarely presented. *See Metropolitan Life v. Glenn*, 128 S. Ct. 2343 (2008).

Finally, Respondents do not dispute the dearth of decisions on what meritorious common law claims may still exist in connection with early retirement severance "packages" that are distinct from existing plan benefits.

In this context, there simply must be a point short of intentional deception that an employer soliciting early retirements with a "special" outside-the-regular-plan package will be held to admitted promises made by its dedicated spokesman. This Court should grant the petition, resolve the conflicting standards among the circuits, and declare where that line is drawn.

Respectfully submitted,

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